1761.

EARL OF ROTHES, &c. *v.* PHILIP.

his father, and would have taken the estate independently of the settlement of 1698. When he executed the settlement sought to be reduced, both characters were in him. He was heir of entail and heir whatsoever. The heirs of entail were all extinct except himself. There were no issue of his own body, and the moment that the heirs of entail were exhausted, the fetters of the entail flew off, and he, the last substitute of entail, possessed the estate in fee simple. He was then in a condition by law, to alter the order of succession, and entitled to make a new settlement.

After hearing counsel, it was

Ordered and adjudged that the said interlocutor be, and the same is, hereby affirmed.

For Appellant, *Tho. Miller*, *Al. Forrester*.
For Respondent, *C. Yorke*, *Alex. Lockhart*.

Note.—Lord Hardwicke has written this note on his papers in deciding this case. "*Vide* the case of Gordon of Park, decided in the House of Lords May 21, 1751; and question, What influence this judgment will have as to the forfeiture of such substitutions, to *heirs whatsoever*, for high treason?"

[Brown's Supp. to Mor. p. 869, et M. 15,609.]

The Right Honourable JOHN EARL of ROTHES, the Right Honourable WILLIAM LORD VISCOUNT BARRINGTON, of the Kingdom of Ireland, and others, - - } *Appellants;*

JOHN PHILIP, Esq., Auditor of the Revenue in Scotland, - - - } *Respondent.*

House of Lords, 16*th January*, 1761.

ENTAIL—RECORDING.—Held that the Act 1685, authorizing the recording of entails, applied to entails executed before that Act was passed, and that such entails were not good against creditors unless recorded.

Margaret, Countess of Rothes, daughter and heiress to John, Duke of Rothes, executed a procuratory in the form of a strict entail of her estates of Rothes in 1684.—Upon
Jan. 1, 1684. which charter passed under the great seal in 1687; and in March 1689 infeftment was taken thereon.

In the year 1685, the statute passed concerning entails

enjoining that they be registered in the register of tailzies, otherwise to be null and viod.

The entail in question, which was executed *before* the *date* of this act, was not recorded in terms thereof in the register of tailzies; and the question was, whether the entail was good against creditors, it not having been recorded? The respondent, as a creditor, insisted that it was not. The appellants contending that the act 1685 did not apply to entails executed as this was, before the date of the act.

The Lords, of this date, pronounced this interlocutor, Mar. 8, 1760. find, "That the provision of succession of the estate of Rothes, "in the marriage contract between the Earl and Countess, "in favour of the heirs of the marriage, can be no bar to the "pursuer's (*i. e.* the respondent) having access against the "estate, for payment of the debts pursued for; and decerned "and declared accordingly. Without prejudice to the "Countess, to affect the estate upon her liferent infeftment; "and the younger children to affect the same by diligence "for their provisions in the contract of marriage, as accords "of law."

Against this interlocutor, the present appeal was brought to the House of Lords.

Pleaded for the Appellants.—That the act 1685, as to the registry of entails, has no retrospective operation,—has only place *in futurum*, and consequently, does not apply to the present entail, which was executed before the date of the act, and which, therefore, must stand good and effectual to all intents and purposes. Such has been the rule adopted in several cases, with reference to entails executed before the act, upon a sound construction of the statute, and such ought, therefore, to be the rule of construction applied to the present case. If a contrary rule were adopted, it would undo every old entail, of which there must be many prior to the date of the act, which would evidently be contrary to every principle of justice. The appellant here took up his estate, as an entailed one; his right was secured against creditors and every one, by the general opinion of the country, and by the determination of the courts of justice for half a century; and it would be hard if, in these circumstances, the entail were not to protect the appellants against creditors.

Pleaded for the Respondent.—As all restraints on property are unfavourable, entails, which restrain the proprietor from full enjoyment, and his creditors from having access to his

1761.

EARL OF ROTHES, &C. *v.* PHILIP.

estate, ought to be judged of *stricti juris*. Even so unfavourable are they, that before the year 1685, it was much doubted, whether entails, with prohibitive, irritant, and resolutive clauses, were effectual against creditors and purchasers at all; but after the decision in 1662, in Stormont's case, the Court of Session held them good against creditors. The act 1685 in question, enjoining the recording of entails, is not only statutory, but declaratory, without distinguishing between entails made before or since its existence. It was easy, as is common, to have inserted a clause, saving existing rights; but comprehending, as it indoubtedly does, all entails, both those before as well as those after the act, no such clause appears; but it declares, such tailzies only shall be allowed, as are recorded in terms of the act. In regard to those entails, executed before the act, it undoubtedly intended that they should be all registered, against which there could be no possible obstacle—no difficulty, and therefore no hardship pleadable whatsoever. Besides, sasine did not follow until after the date of the act.

After hearing counsel, it was

Ordered, adjudged, and declared, That entails created of lands in Scotland, with prohibitive, irritant, and resolutive clauses, before the making of the act of Parliament concerning tailizies in 1685, ought to be recorded in the register of tailzies, according to the said statute. And it is therefore ordered and adjudged, that the said petition and appeal be dismissed, and that the said interlocutor be affirmed.

For Appellants, *Thomas Miller, C. Yorke.*

For Respondent, *Al. Forrester, Al. Wedderburn.*

Note.—Lord Kilkerran says, "The Lords of Session found that the tailzie in question ought to have been recorded, and not having been recorded, it is not effectual against a creditor. Had a question been stated on the general point, how far the act 1685 was to be understood to require the registration of tailzies that had been completed by infeftment before the date of the act, it appeared to be the opinion of the plurality, that the act 1685 did not require the registration of such anterior entails, though I was one of those who thought it did, as was also Kames, Colston, &c.; but indeed there was no occasion to determine it, for though, where there are more points in a cause, the Lords determine the whole points, nor can they refuse to do so in justice to the parties, yet, still they only determine points that are in the case; whereas this general point was not a point in the cause; and as many of the Lords, who thought the regis-

tration not necessary of a tailzie completed by infeftment before the act, thought the tailzie in question was to be taken as a tailzie made after the act. as being to be considered as no earlier made than it was completed by sasine: on the vote put, in general, whether the tailzie in question needed to be recorded, it, by a considerable majority, carried as above, against the opinion of the President."—*Vide* Brown Supp. Kilkerran, p. 366.

SIR THOMAS KENNEDY, Claiming the Title, Honour, and Dignity of EARL of CASSILS, EARL of RUGLEN and MARCH also Claimant. } *Appellant; Respondent.*

House of Lords, 26*th January* 1762.

PEERAGE—SUCCESSION TO.—When the dignity of the Earldom of Cassils was first created, (1509), written patents of nobility were not introduced, containing special limitations of the descent. The Cassils' family estates, according to the investiture, bore at this time to be in favour of heirs general, or heirs of line. Afterwards, and in the year 1671, resignation was made into the hands of the Crown, and a new charter procured, bearing to be in favour of heirs male, whom failing, to heirs female of his body "cum armis et dignitate familiæ de Cassils."—Held, 1*st*, Where no express limitation, or descent of the grant appears, the dignity is always presumed to descend to the heir male. 2*d*, That the resignation and new charter 1671 did not comprise, or extend to the honours, but only to the estate.

THE first creation of the Cassils peerage was in 1459, in favour of Gilbert Kennedy, who was grandson of Robert III. King of Scotland, (by Mary Stewart his daughter), by the title of Lord Kennedy. David Kennedy, Gilbert's grandson, was afterwards created *Earl of Cassils* by King James IV. in 1509.

At this time, written patents of honour had not been introduced, these dignities being conferred by the sovereign himself, in parliament, without any writ, limiting the descent of the honour in any particular way, or on any particular heirs; and, as service in parliament, fidelity and homage were due in consequence of the dignity so conferred; these were always understood to descend, according to the rules of the feudal law, to the heir male of the person first ennobled, unless *heirs whatsoever*, or *heirs female*, had been particularly called to the succession.