

No 3. creet obtained against him thereupon. The pursuers *answered*, That this was *jus tertii* to the defender, who could not dispute the assignee's right. The defender *answered*, That it was *exclusio juris agentis*.

THE LORDS repelled the defence, as being *super jure tertii*, and decerned; but ordained suspension to pass, without caution or consignation, that the assignee may be called, and dispute his right.

Stair, v. I. p. 283.

No 4. 1666. June 23. ARBUTHNOT *against* MARY KEITH.

ANDREW ARBUTHNOT having gotten a gift to the behoof of the Viscount of Arbuthnot, of the marriage of the heirs of John Keith of Pitten, did thereupon pursue the two heirs portioners. One of them being dead, he insists now against the other for her part, who alleged no process, because none was called to represent the other, who is thus far interested, that the probation of the avail of the marriage against the one will prejudice the other.

THE LORDS repelled the defence, and found it would not prejudice the other, against whom new probation behoved to be used.

Stair, v. I. p. 380.

No 5. 1685. February. JEAN COCKBURN *against* CONGLETOWN.

SIR ROBERT HEPBURN having provided his estate to young Congletown, with this provision, That he should take and use the name and arms of Hepburn, and marry Cockburn of Piltown's eldest daughter; and a clause of irritancy, That, if he contravened, his second brother should succeed to the estate; after Sir Robert's decease, Congletown was required by the gentlewoman's friends to marry her; and, upon his refusal, a declarator raised at her instance, for declaring that he had lost his right to the estate, by refusing to marry the pursuer, according to Sir Robert's appointment.

Alleged for the defender; That the pursuer had no title to pursue his declarator, in respect the benefit of the irritancy was not to accrue to her, but to the defender's brother, who was to succeed by the tailzie, without the burden of marrying her, and he did not concur; so that the most the pursuer could pretend was but damage and interest, against which the defender had competent defences.

THE LORDS sustained process at the pursuer's instance, for declaring the irritancy.

SIR ROBERT HEPBURN tailzied his estate to one, with this provision, That he should marry a certain gentlewoman, and if he failed to perform, his brother

should succeed to the estate ; the heir of tailzie being required to marry the gentlewoman, and refusing or delaying to do it, the LORDS found she had interest to declare the irritancy for damage and prejudice, though the benefit of succession would fall to the contravener's brother, who was the next member in the tailzie.

No 5.

Fol. Dic. v. 1. p. 516. Harcarse, (ALIMENT.) No 135. p. 27. & (TAILZIE.) No 961. p. 270.

* * * Sir P. Home reports this case :

The deceased Robert Hepburn of Keith having made a disposition of tailzie of his estate, in favour of Robert Congletown, and the heirs male of his body ; which failing, to his second and other brothers successively ; and, by an express quality in the tailzie, he reserves liberty to himself to alter or revoke the same, or to dispose upon the lands ; as also with this provision, that his heirs of tailzie should be liable to fulfil and perform all his obligations and deeds, in favour of whatsoever person, as they would eschew the wrath of God ; and Sir Robert by a writ apart, relative to the said disposition of tailzie, having ordained the said Robert Congletown to marry Jean Cockburn, his Lady's niece, and in case of her decease, ordained him to marry her sister, under an express irritancy, that he should be excluded from the same estate ; and the said Robert Congletown being required to solemnize the marriage, and having refused to do the same, the said Jean Cockburn, with concurrence of her father and mother, Cockburn of Ormiston and others, her near relations, pursues a declarator against the said Robert Congletown, that it may be found and declared, that he has lost all right and title to the estate, by refusing to marry the pursuer.—*Alleged* for the defender, That the pursuer has no interest to crave that he should lose the right of the estate, seeing the irritant clause is not conceived in her favours ; and the second brother, who is the next member in the tailzie, is neither pursuing nor concurring in this declarator.—*Answered*, That the pursuer has sufficient interest to declare that the defender has incurred the irritant clause, and lost the right to the estate, in respect the irritant clause is subjoined to the defunct's ordinance and appointment, by which the defender is ordained to marry the pursuer, which was subjoined as a penalty to make the said ordinance and appointment effectual, that if the defender should not give obedience to the same, he might lose the estate ; and albeit the defender's brother, who is the second member of the tailzie, should collude with the defender, yet that cannot hinder the pursuer to insist in her declarator, conform to the defunct's appointment ; and it is not the question, to whom the estate shall belong, if the irritancy were declared ; but, seeing the defunct has appointed the defender to marry the pursuer, who is a suitable match to him in all respects, with certification, that if he should refuse, he should lose the estate, she has good interest, by virtue of that

No 5. ordinance and appointment, to declare the irritancy.—THE LORDS sustained the pursuer's interest to declare the irritancy.

Sir P. Home, MS v. 2. No 644.

1746. June 19. MARGARET KENNEDY *against* MR JOHN ERSKINE.

No 6.

An adjudication being craved against a person, as heir to another in an estate, the present possessor was allowed to object and to dispute the defender's propinquity.

JOHN BLACKADER, tailor in Canongate, gave bond in trust to Margaret Kennedy, upon which she proceeded to adjudge from him the estate of Tulliallan, as charged to enter heir to Sir John Blackader of Tulliallan, alleged to be his predecessor, that thereupon she might quarrel the titles of Mr John Erskine advocate to the said estate.

Mr Erskine appeared for his interest, to stop the adjudication, and offered to prove that there was in being a nearer relation of Sir John Blackader than the said John. But the pursuer alleging that the estate was a male-fee, and he was heir-male,

THE LORDS found it competent to Mr John Erskine, being in possession of the estate of Tulliallan by proper titles of property, to object that the person against whom the adjudication was craved, was not the nearest heir of the deceased Sir John Blackader, and that there was a nearer heir existing; but allowed the pursuer to be heard on this allegation, that the estate of Tulliallan was a male-fee.

A.G. Lockhart. Alt. Jo. Erskine, sen. Clerk, Forbes.

D. Falconer, v. 1. No 119. p. 146.

1756. January 9.

OLIVER COULT, Esq; and Others, *against* The TOWN of MUSSELBURGH.

No 7.

The inhabitants of a town bound themselves by oath not to sell their fulzie, but to persons residing within the liberties.

The neighbouring heritors, not having a direct interest, found not entitled to challenge the combination.

EVERY burgh of Musselburgh at his admission has an oath administered to him in the following terms: 'That he shall not sell his muck and fulzie to any but those who dwell within the burgh and liberties thereof.' And this oath being of ancient date, has constantly been administered, and due obedience given to it. Some neighbouring heritors who were prejudiced by this regulation, brought a declarator against the Town of Musselburgh, subsuming, That the oath was an unlawful restraint upon the liberty of the subject, and concluding, that the inhabitants were not bound to give obedience thereto. This cause being reported by the Lord Ordinary, it occurred to some of the Lords in point of right, that a burgh of barony may, like a baron, confine their dung to their own lands; and, like a baron, discharge the importation of ale; that a royal burgh being erected for the sake of commerce, differs in both particulars. In the