good against creditors who have a sufficient intimation otherwise of the tailzie, since it is expressed in the infeftments: For if the law hath thought proper, for the more security of creditors, to order a publication both ways, creditors have good reason to insist upon their privilege; and though one of them might be thought sufficient security, there is no harm done in commanding both: Multitude of the law breaks not the law.

No. 15

"The Lords found, That the tailzie not being registered in terms of the act of Parliament, cannot prejudge the creditors."

Rem. Dec. v. 1. No. 52. p. 101.

*** Edgar's report of the sequel of this case is Sect. 5. *infra.*

1726. *February.* HALL *against* CASSIE.

No. 16.

Tailzies good against heirs without registration, but not against creditors. See APPENDIX.

Fol. Dic. v. 2. p. 436.

1728. *February 2.* LORD STATHNAVER *against* DUKE of DOUGLAS.

No. 17.
Action competent against an heir to purge the tailzie of his debts, which he had laid upon it contrary to the will of the tailzier.

The deceased Jean Countess of Sutherland, proprietor of a small estate near the village of Inveresk, executed a disposition and tailzie thereof in favours of her son Archibald Earl of Forfar, and the heirs-male of his body; which failing, to William Lord Strathnaver, and the heirs-male of his body; which failing, &c. In these lands the Countess thereby "obliges herself, her heirs and successors, under the conditions therein expressed, duly and lawfully to infeft the said Archibald Earl of Forfar, and the other heirs of provision; and for that effect to grant procuratories, precepts, and other writs necessary." And in the procuratory of resignation contained in the said tailzie, provides and declares, "That it shall not be in the power of the said Archibald Earl of Forfar, and the heirs of provision above-written, to contract debts upon the foresaid lands, or others above disponed; or to affect the same with any sum exceeding two years rent for the time. To this is subjoined, "That it should not be in the power of the said Archibald Earl of Forfar, and his heirs of provision, to give away, dilapidate or impignorate the said lands, nor to allocate, or to bestow them in fee or jointure to their Ladies;" and in that case the tailzie is declared to be void and null, in so far as conceived in favours of the person so acting; and the next heir of provision is to succeed in his right and place. This disposition, containing a clause "dispensing with the not delivery," was

No. 17.

found among the Countess's writs after her death, remaining in the naked state of a disposition, without any thing done upon it.

Archibald Earl of Forfar, the institute, having predeceased his mother the Countess; his son, also Archibald Earl of Forfar, neglecting the disposition of tailzie, served heir in special to his grandmother in these lands of Inveresk, *tanquam legitimus et propinquior hæres*, and charged them with his father's debts and his own to a considerable extent. He having thereafter died without heirs-male of his own body, the Lord Strathnaver, next substitute in the tailzie, served heir of provision to Archibald Earl of Forfar the father, first institute in the tailzie; and, by the general service having established in his person the procuratory, and the obligations relating to the entail, he brought an action against the Duke of Douglas, heir of provision to the last Earl of Forfar in the family-estate, to disburden the tailzied lands of the debts laid upon the tailzie by the said Earl, contrary to the express intention thereof; concluding, that the pursuer, as by the substitution he was creditor in these obligations, and might have had a competent action against the Earl of Forfar, as served heir of line to the Countess, to resign in terms of the entail, and to relieve the estate of his own debts, which he had brought upon it contrary to the express mind and will of his predecessor; consequently his Grace the Duke of Douglas, as served heir of provision in the estate of Forfar, is liable to the pursuer in the same relief.

The *first* objection was laid against the pursuer's title in this shape, That his service to the Earl of Forfar, institute in the tailzie, could avail him nothing, because the Earl never had any right in his person, having predeceased his mother, without accepting the disposition conceived in his favours. And it was pleaded, That in all substitutions, if the institute accept not, the whole must fall to the ground, there being no other method for a substitute to take the right, but by a service to the institute, who never having accepted, never had a right. And this led into a general point, "If Lady Sutherland could put a fee in her son's person, so as to make him proprietor, without any consent or acceptance of his?" The Duke insisted that she could not; otherwise the most absurd consequences would follow; particularly this, What if by this disposition Lady Sutherland had burdened Lord Forfar her son with the payment of £.5000 to Lord Strathnaver, or any other person? If the fee was in him by the single deed of Lady Sutherland making the disposition in his favours, then as fiar he became liable to every condition of clogging the fee, consequently was personally liable to the payment of £.5000: Now, if it is absurd that one shall be made liable *in infinitum* without his consent, it must follow, that without the Earl's acceptance there was no fee in him, and that therefore Lord Strathnaver could carry nothing by his service. It was urged, *2do*, upon this head, That the disposition having remained with the Countess of Sutherland undelivered until her death, became thereby only effectual, and could not produce a right in the Earl of Forfar, who died before her. And it was contended, That before delivery, or the death of the granter, no sort of right is conveyed, revocable or irrevocable; the deed or writ remaining still uncompleted;

No. 17.

though subscribed in the formallest manner; so that delivery or death are necessary, not to prevent revocation of a right already transferred, but to transfer the right itself.

Answered to the *first*, It is a general law of nature, "That one can bestow or transfer to another without his consent, though he cannot bring him under an obligation:" For it is lawful to do good to others without their concurrence, but not to do harm. And hence it is that effectual conveyances are commonly made to infants or absents, they knowing nothing of the matter. Nor will the absurdity follow, that thus one may be made liable *in infinitum* without his consent; for it is not the simple quality of a man's being proprietor that subjects him to the conditions clogging the property, but his consenting to act as proprietor, and of consequence consenting to all the conditions: So that any person to whom a conditional property is conveyed without his concurrence, has his choice of two things, either to renounce the right, or to keep it with all its burdens. And were this matter otherwise, our law would be inextricable, especially in the matter of infeftments, where it is a maxim, "That one infeftment cannot be taken away but by another" Now, it is well known that by the forms of our Chancery, any one may be infeft without his consent: And if in such a case the person infeft were not fiar, the matter would be truly inextricable; for he could not convey, not being proprietor; and yet the infeftment must be conveyed, because one infeftment cannot be taken away, but by another. To the *second*, answered, A disposition the moment it is duly signed conveys a right to the disponee, being in its nature a completed deed. Indeed before delivery there is *locus pœnitentiæ*, a power of revocation, that the disponer may have all the advantages of deliberation; and this is the reason why the death of the granter, where there is a clause "dispensing with the delivery," is equivalent to delivery, because thereafter there is no revocation: But were delivery necessary to the constitution or existence of the right in the disponee's person, it would be hard to make this matter consistent, because death is not delivery real or symbolical: If there was no sort of right in the disponee's person before the disponer's death, it is not easily conceivable how it could come afterwards.

It was added by the pursuer, That this is all *ex superabundanti;* for with respect to him, it is no matter whether the Earl of Forfar had the fee of the obligation or not: If he had, Lord Strathnaver is his heir: If he had not, Lord Strathnaver has a direct interest as creditor, all the persons named before him having failed without establishing the *jus crediti* in their persons. And he endeavoured to make out this from the nature of tailzies, in which the substitute is as directly called in the *second* place, as the institute in the first. It cannot be doubted but Lady Sutherland, as she designed the estate of Inveresk for the Earl of Forfar, and the male-heirs of his body, preferably to Lord Strathnaver; so she designed it for Strathnaver preferably to any other mortal: How then can it be said, if the institute neglected to accept, that the whole must be evacuated? Is not this directly against the intention of the maker? Was not Strathnaver called absolutely preferable to

No. 17. the Duke of Douglas and all others, whether the two Earls of Forfar should accept or repudiate the heritage? If this be unquestionable, then it follows in general with respect to all tailzies, "If the institute acknowledge the right, the person called in the *second* place is a proper substitute; if the institute repudiate, or according to the defender, if he neglect to accept, the person called in the *second* place cannot be a substitute, and therefore must be a conditional creditor, whose right is purified by the removal of the person called before him, without having the right in his person."

It was objected in the *second* place, This action is not competent against the Duke of Douglas, because it was not competent against his predecessor the Earl of Forfar; and that for two reasons, 1*mo*, Because the Earl himself was creditor in the disposition of tailzie; and one cannot be bound to implement a deed in his own favours: 2*do*, There is no clause prohibiting the altering of the succession; and it is a rule, that even an heir accepting, cannot be bound to implement at the suit of a substitute, where he has power to alter. And upon this *second* head it was contended, Though there is in the tailzie a prohibition to contract debt, and a prohibition to alienate, that will not amount to a prohibition to alter the succession; for there is nothing more settled amongst us than the different effects of clauses in entails: A clause "not to alter the succession," never was construed to import a restraint, either as to the alienation, or as to the contracting of debt; and yet both the contracting debts and alienating, are effectual alterations, and the strongest kinds of alteration of the succession: Just so, a clause "not to contract debt," never was construed to import, "that the heir of entail could not alienate:" All of these are quite distinct, and yet if the intention of the maker of the entail were not tied down by rules, so as that he is not understood to intend any thing that he has not expressed according to the proper forms of law, it would be impossible to maintain, that a man who inserted any one of these clauses, did not intend the whole: But a naked intention in such case signifies nothing, where the proper clauses are not used: *Si voluit non fecit:* And the rules of law are the only direction in judging what he intended, and what he did not intend.

Answered to the *first*, There can be no doubt, but the Earl of Forfar was bound to fulfil this tailzie, according to the obligation which the granter laid upon herself and heirs, in order to secure the substitutes, who had each of them an interest in the subject, as well as the institute: And the institute here was not bound to do a deed in his own favours; for he might, if he so pleased, neglect himself, and dispone directly to the substitute. But then even supposing he could not have been directly bound to fulfil, the substitute at any rate has an interest, that the tailzie be not evacuated; and this equally, whether the Earl of Forfar had served heir to his grandmother or not: He could have pursued a registration of the tailzie, to prevent the subject from being carried off by the debts of the institute or others: He might, if necessity so required, to prevent the subjects going into decay, till his right should take place, have applied for a factor, and put the subject under sequestration. And if before registration, the proper creditors of the in-

stitute, or other apparent heirs of tailzie, should have adjudged the estate in prejudice of the substitute, so far as these debts of his had gone to exhaust the tailzied estate, so far that would have made him liable to the substitute *in valorem* of these debts, and consequently to have purged the subject of them. Answered to the *second*, There is no reason given, why implied obligations should be refused their force in tailzies, more than in any other matter: If the mind of the tailzier be clear, it is no matter in what words it be expressed: And here the mind of the tailzier cannot be doubted of; for since she has inserted both a prohibition to alienate and to contract debt, either of the two implies "a prohibition to alter the order of succession," not only because of the general rule, "qui prohibet majus, censetur et prohibere minus," but because the very scope and intention of the prohibition to alienate or contract debt, is no other, than to preserve the succession in the channel which the granter has devised; inasmuch as it is not the affection to an estate, but the affection to the persons who are in the granter's eye to enjoy it, that moves any man to tailzie his estate, and lay a restraint upon his heirs.

It was objected in the *last* place, Though our law has allowed of tailzies, it has not provided such an action as this, against the heirs of an heir of tailzie, contracting debts contrary to the provision of the entail. The irritant clauses have been thought a sufficient security for maintaining such entails, and the forfeiture of the estate in case of contravention, a high enough penalty; and the act of Parliament has provided no other remedy. The Duke of Douglas therefore insists, That however Lord Forfar may have contravened and incurred an irritancy, there lies no action against him upon that contravention. If Lady Sutherland did not secure her succession in the proper way, by inserting the proper clauses, and recording the entail, she had herself to blame: Lord Strathnaver must take it as he finds it: The law has introduced no personal action against the heir of entail contravening, but the declarator of irritancy allenarly; nor was there ever such an action heard of in any age, either since the act 1685, or before; for at that rate, in every case, where a settlement is made with a clause, "not to alter the succession," if the proprietor sell the estate, the next heir in the destination would have an action against the heir for the value; but surely the Lords will never give countenance to such a claim. The law hath taken another method as to heritage, much more adapted to the nature of the thing, and even to the intention of parties who make entails, which is not to allow of personal action for the value, but to provide a security against the alienation itself. And indeed the reason is very different here from what it is in moveables, where the main intention of the defunct is to benefit the legatary, by giving him a thing of such a value, which he may afterwards dispose of as he pleases; and if he get the value, the will of the defunct is looked upon as completed: But in tailzies of lands, the principal intention is, to preserve the estate to the heirs to perpetuity, and not to give the value to any one substitute; therefore the law is adapted to that intention, by giving a real security, not a personal action for the value upon contravention.

No. 17.

The pursuer answered, That after all is said, he is insisting in nothing but a common action for reparation: The Earl of Forfar, as heir of line to the Countess of Sutherland, maker of the entail, was obliged to fulfil the conditions under which she bound herself and her heirs, that the heritage should descend: Instead of fulfilling these conditions, he burdened the heritage with his debt, and did thereby all in his power to disappoint the entail. Do not the common principles of law dictate, that he and his representatives ought to make reparation to the substitutes for the damage he has done them, and for that reason purge the heritage of these debts? It does not admit of a question; and if the contrary were found, the act of Parliament 1685 would be of no significancy to preserve a subject entailed; for an heir entering would have nothing to do, but omit inserting the irritancies which the law directs in the subsequent conveyances, and charge the estate with debts to the value; and having thus the price of the estate in his pocket, he could apply it in what manner he thought fit, as being subject to no action at the instance of the substitutes: And it is a jest to say, that this would be an irritancy of his right; for what does he suffer when he has got the full price of the subject, and at the same time shaken himself loose of the fetters put upon him, and disappointed the anxious settlement of the donor?

"The Lords found, That the heirs of tailzie in the Countess of Sutherland's disposition, could not alter the order of succession therein set down; and that the last Earl of Forfar, who was infeft as the said Countess' heir of line, was obliged to have resigned, in terms of the procuratory contained in the tailzie; and that the Duke of Douglas, who was heir of provision to the said Earl of Forfar, is thereby bound to disburden the said Countess' tailzied estate, and to relieve her heirs of tailzie of the debts of the family of Forfar."

Fol. Dic. v. 2. p. 435. Rem. Dec. v. 1. No. 104. p. 198.

1736. *February* 4. EARL of PETERBURGH *against* FRASER.

No. 18.

A wadset purchased by an heir of entail, the reversion of which made part of the entailed estate, found affectable for his debts.

C. Home.

*** This case is No. 9. p. 3086. *voce* CONSOLIDATION.

1744. *January* 31.
MRS. MARGARET LAUDER *against* SIR DAVID BAIRD of Saughtonhall.

No. 19.
An heir of entail not

The estate of Saughtonhall descended to Sir Robert Baird by a tailzie, under irritant and resolutive clauses, but with power to the heirs of tailzie to give life-