" in the contract, and the infeftment following on " the said procuratory, the said Lady Nairn is sub- " ject to the prohibitory clauses *de non alienando et* " *non contrahendo.*"

For Appellant, *Ch. Areskine, Ja. Erskine.*
For Respondents, *Ro. Dundas, Will. Hamilton, W. Murray.*

It would appear, that in this case, the entail, which had been made prior to the act 1685, was not recorded in terms thereof. Elchies, (*voce* Tailzie, No. 5.) says, that the case of Borthwick *v.* Borthwick was quoted, as decided in the House of Peers, (*supra* page 53,) in which it was found that an entail, although made before the act, was not effectual against creditors without being recorded. This point, however, is not founded upon at all in the appeal papers.

JOHN WALKINSHAW, *Appellant;*
His MAJESTY'S ADVOCATE, *et alii, Respondents.*

9th June 1737.

FALSA DEMONSTRATIO.—Found that an attainder was not vitiated, although in the act the person was described by the name of Wakinshaw, instead of Walkinshaw, and as being " of " Scotstoun," (the estate of his father,) although, at the time, he was not infeft in any lands.

[Elchies, *voce* Falsa Demonstratio, No. 1.—C. Home, No. 30, p. 56.—Mor. Dict. p. 4723.]

JOHN WALKINSHAW, son of William Walkinshaw of Scotstoun, was partner in a mercantile house in Glasgow. Having been engaged in the rebellion, he was, by virtue of an act of Parliament of the 1st

No. 40.

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Geo. I. attainted of high treason, by the name and designation of "John Wakinshaw of Scotstoun."

In 1733 he obtained the royal pardon; and a question coming afterwards to depend between him and his former partners, it was argued by the latter that the copartnery had ceased at the date of the attainder, which necessarily had the effect of disabling him from continuing a partner. The Lord Ordinary found, "That upon John Walkin-
"shaw's going into the rebellion, and from the time
"ascertained by the act of attainder, the society
"and company did cease and was dissolved as to the
"said John Walkinshaw, or any interest that could
"arise to him, or any other in his right, after that
"time."

Walkinshaw thereafter varied his plea, and maintained that the act of attainder founded upon could not affect him, in as much as the person attainted by it was John Wakinshaw of Scotstoun; whereas his name was Walkinshaw; and his proper designation, not "of Scotstoun," but "of Glasgow, mer-
"chant."

To this it was answered, that there is no such material difference between the two names as can amount to a misnomer; and he having, in consequence of the death of his father, become entitled to the estate of Scotstoun, he was properly designed by that addition.

The Lord Ordinary (10th July 1736) "found
"that there was no misnomer of the said act with
"respect to the name and designation of John
"Walkinshaw of Scotstoun, and therefore repelled
"the allegeance founded thereon."

The Court, (July 8,) adhered.

Entered Feb. 6, 1737.

The appeal was brought from these interlocutors of the 10th June and 8th July 1736.

Pleaded for the Appellant:—The two names are entirely different. In point of fact, there are several distinct families of each name in Scotland; and there are many instances in which the change or omission of a single letter would completely alter the name.

Neither was the addition of Scotstoun a proper addition to denote the appellant. He was not infeft in any lands, and had not right either to that estate or to any other. But infeftments alone can give a right and title to such additions. His proper designation was "Merchant in Glasgow."

Pleaded for the Respondents:—There is a great difference between a material misnomer, where the description of the person outlawed evidently disagrees with the true character and description of the person against whom it is made use of, and an accidental mistake in spelling the name or surname, or in the addition of the person attainted, concerning whom there remains no uncertainty. In the first case, if the name, surname, or addition does not truly belong to the person against whom it is used, but may properly be applied to a different person, (which might be the case by the mere change or omission of a single letter, as in the names of Wight and Wright,) the attainder might not be effectual. But, in the latter case, where name, surname, and addition all truly belong to the party, a mere inaccuracy in writing or spelling the name can make no material error in the attainder; and, in the present case, the difference in the spelling could not possibly give occasion to any uncertainty, as the names are the same, and are always pronounced alike.

With regard to the addition, as the true desig-

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nation of the appellant's father was "of Scotstoun," and as he had died before the attainder, and left the estate to the appellant, his eldest son, the latter was properly designed, and commonly known by the addition of Walkinshaw of Scotstoun; for, by the custom of the country, proprietors take and have designations given to them from their lands, whether purchased or succeeded to, and without regard to infeftment being taken or not.

Judgment, June 9, 1737.

After hearing counsel, "it is ordered and adjudged, &c. that the appeal be dismissed, and "that the said interlocutors complained of be, and "the same are hereby affirmed."

For Appellant, *W. Noel, W. Murray.*

For Respondents, *Duncan Forbes, J. Strange.*

DR. GILBERT WAUCHOPE, and AGNES his Sister, } *Appellants;*

ANDREW WAUCHOPE of Niddrie, Esq. *Respondent.*

14*th June*, 1737.

SUCCESSION.—TUTOR and CURATOR.—MINOR.—Found that curators or administrators cannot directly alter the minor's or constituent's succession, by taking bonds secluding executors in lieu of bonds to heirs and executors, without the consent of the minor or constituent.

PROOF.—Circumstances under which parole evidence was allowed to prove the knowledge and consent of the minor.

[Elchies, *voce* Minor, No. 6.—*voce* Succession, No. 2.—*voce* Tutor and Curator, No. 7.]

No. 41. ANDREW WAUCHOPE of Niddrie, a minor, executed a deed with the consent of his curators, whereby