

1680. December 21.

LADY MARGARET CUNINGHAME *against* The LADY CARDROSS.

No 6.

A gentleman having disposed the bulk of his estate to his second son, and certain heirs of tailzie, with the burden of relieving the heir of line of the debts; and, after the eldest son's death without issue, the second son being served heir both of line and provision, the obligation for relief was found not extinguished in his person, though he was both heir and creditor in the said relief, and therefore his heir of line, who was also heir of line to the maker of the tailzie, was found to have relief against the heirs of provision, so as to have the untailed estate disburdened of all debts.

SIR JAMES STUART of Kirkhill disposed the bulk of his estate to William Stuart his second son, (his eldest son being a weak person) and to William's heir-male of his body, which failing, 'To Catharine Stuart, his younger daughter, and her heirs;' the disposition contains this clause, 'That the said William and his heirs of tailzie shall be obliged to pay Sir James's whole debts, and perform his whole deeds and obligations in the same way as if William were his heir, or as Sir James would be obliged himself;' about the time that this disposition was signed, Sir James's eldest son died, and his son Sir William became infeft upon this disposition, and there being some wadsets not contained in the tailzie, Sir William was infeft in these, 'as heir to his father,' for they were disposed to him and his heirs whatsoever; Sir William died without heirs of his body, and thereby his succession divided, the tailzie descending to Catharine, now Lady Cardross his youngest sister, as heir of tailzie; and the untailed estate fell equally to the Lady Cardross, and to Lady Margaret Cuninghame, only daughter of his eldest sister; Lady Margaret and her husband, Sir John Maitland, pursue a declarator against the Lady Cardross and the Lord Cardross her husband, to hear and see it found and declared, that Lady Margaret had right to the half of the untailed estate, and that the Lady Cardross, as heir of tailzie to Sir William, was obliged to pay Sir James's debts by the foresaid clauses in the tailzie, and to relieve the pursuer as heir of line thereof. It was *alleged* for the defender, That this clause contained nothing of relief, but was only to show that Sir James intended not by this disposition to defraud his creditors, to whom he was, or should become debtor, and therefore obliged his son and heirs of tailzie to pay his debt, which could only be understood according to the order of discussion allowed by law, after his executors and heirs of line were discuss. It was *answered*, That Sir James's disposition, bearing expressly, 'to Sir William his second son,' with an obligation 'to pay his debt,' could be no otherways intended or interpret, than that the little remainder reserved out of the tailzie, should be reserved for his eldest son, who otherways had no provision or aliment, and so being conceived in general terms, 'That Sir William's heir of tailzie should relieve Sir James's heir of line,' the clause behoved to have the same effect as to this pursuer, as heir of line, as it would have had to Sir James's eldest son, if he had lived; 'THE LORDS did formerly find, That the foresaid clause did import a relief to Sir James's heir of line, that the heirs of tailzie behoved to pay Sir James's debt, without discussing or recurring upon the heir of line.' It was now further *alleged*, That this pursuer could claim no relief as heir of line to Sir James, because she was now entered heir of line to Sir William, who was only heir of line to Sir James, and therefore was liable to all Sir William's debt, which comprehended not only the debts contracted by Sir William, but all Sir James's

debts did become Sir William's debts, by entering his heir, and the pursuer being Sir William's heir of line is simply liable for all Sir William's debts, whatever way he was obliged, and can seek relief of none of them from Sir William's heir of tailzie by this clause, because the clause did oblige Sir William 'and his heirs of tailzie to pay Sir James's debt;' and albeit the clause had born expressly, 'to relieve Sir James's heir of line;' yet Sir William being actually served heir of line to Sir James, he became both debtor and creditor on the relief, *et confusione tollitur obligatio*, for confusion is an unquestionable peremptory defence, as effectual as payment, or compensation. *2do*, The pursuer neither is, nor can be heir of line to Sir James, seeing Sir William was entered heir of line to Sir James, and the whole estate tailzied and untailzied was once settled in the person of Sir William; so that the pursuer being Sir William's heir of line, must be liable to all debts whereunto Sir William was liable, as contracted by himself, or representing his father, and cannot be said to be Sir James's heir of line. It was *replied* for the pursuer, That albeit she be immediate heir of line to Sir William, yet she is immediate heir to Sir James, and would be liable to all Sir James's debts, although they had never been established against Sir William; and it is acknowledged, that *quoad* the creditors, they have full access against the heir of line, and of tailzie of Sir William. But all the question is, whether Sir James's heir of line succeeding both to him and Sir William, hath the benefit of the clause in the tailzie, importing relief, which cannot be denied, seeing it is evident that Sir James did settle a part of his estate tailzied, and a part untailzied, that he did design to keep the untailzied estate without burden, whensoever the succession should divide betwixt the heirs of tailzie and of line. And as to the pretence of confusion, though it was an absolute peremptory defence before the feudal law, when *additio hereditatis* was *actus legitimus nec excipiens diem nec conditionem*; but now the feudal customs having introduced so many kinds of succession, which may be qualified with all imaginable qualifications, the confusion that was then perpetual, is frequently now but temporal, during that time that only one person is both heir of line and tailzie; so that such clauses must be interpreted according to the rational design and meaning of parties, to take effect at the first time the estate shall happen to divide betwixt the heirs of line and heirs of tailzie; so that Sir James knowing clearly that this clause could never take effect during his son's life, in whose person his estate tailzied and untailzied was established, his eldest son being dead about the time he subscribed the disposition, his design could be no other, but so soon as his estate should divide betwixt his heirs of tailzie and of line, the heir of tailzie should pay his debt, without burdening the heir of line.

THE LORDS found, that the pursuer as being both heir to Sir William, and by him to Sir James had right to crave relief off the Lady Cardross, as heir of tailzie, the succession being now first divided betwixt the Lady Cardross as heir of tailzie, and the pursuer and the Lady Cardross as heirs portioners and of line.

No 6. and that the concurrence of both estates in the person of Sir William, did not absolutely extinguish the obligation of relief, but only during the time that the estate was in one person.

Fol. Dic. v. 1. p. 195. Stair, v. 2. p. 821.

1693. January 25. BURNET of Carlips *against* NASMITH of Posso.

No 7.

Though an apprising during the legal, purchased in by the heir served, becomes thereby extinct *confusione*, it is not the same, where it is purchased in by the heir having a disposition of the appraised lands, though thereby liable to the debt appraised for *præceptione hereditatis*, because *præceptio hereditatis* is not an universal passive title, nor does the heir thereby become *eadem persona cum defuncto*.

THE LORDS found that a backbond (though personal) affected a comprising even against a singular successor, during the currency of the legal, being but a collateral security; and that though the 10 years were elapsed since Posso acquired in these rights upon his father's estate, whereof he was apparent heir, yet, that the said 10 years were interrupted by the extract of the summons at Carlips' instance against him, taken from the signet, and by the decision 19th June 1668, marked by Stair; which the Lords found equal to an execution, though now lost; the Lords judging these acquisitions often fraudulent and unfavourable, viz. Burnet against Nasmith, *voce* HEIR APPARENT.

1693. November 8.—ON a bill given in by James Nasmith of Posso against Burnet of Carlips; it occurred to the Lords, to reconsider their former interlocutor given in this cause, that though a back-bond will affect the granter, yet how far it meets his singular successor, not by a voluntary disposition, but by a legal diligence of apprising or adjudication from him, even after it is perfected by infeftment; the LORDS resolved to hear it farther as a weighty and material point. See Stair's Institutions, b. 3. tit. 1. § 21. and the two decisions there cited in 1676; viz. Brown against Smith, No 76. p. 2844.; and Gordon against Chein, *voce* PERSONAL and REAL; and 10th March 1629, Shaw *contra* Kinross, *voce* PERSONAL and REAL.

1693. December 28.—THE LORDS advised the tedious and intricate debate between Burnet of Carlips and James Nasmith of Posso; and as to the *first* point, they were all clear that a back-bond granted by an appriser, militated not only against himself, but also against his singular successors, in two cases; if either the apprising was *in cursu* and not expired, or if the apprising stood *in nudis terminis* of a personal right, and no infeftment taken upon it. But the question here occurred, that the back-bond was given by Sir Michael after the apprising acquired by him was expired; and though there was no infeftment upon it, at the time when he subscribed the back-bond, yet shortly thereafter infeftment followed, and whether from that time downwards the back-bond could meet, or affect singular successors? For it was acknowledged, that, in heritable voluntary dispositions, such a back-bond given by the disponent, would not meet the receiver of the disposition, and that there was the same parity for an expired apprising, because then it was no more *pignus legale* for security of the money, but the appriser turns proprietor: But it was *alleged*, there was a dif-