1707. *November* 13.

LORD MOUNTSTEWART *against* DAME ELIZABETH MACKENZIE.

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The nearest heir existing at the time of the devolution of the succession and service admitted without suspending the service during the possibllity of a nearer heir.

When the nearer heir afterwards appears, the person who had been served will be considered as a *Fidei-commiss.* altho' not liable for interim rents.

The Lord Mountstewart, and the Earl of Bute, his father, as administrator in law to him, gave in a bill, representing, that George Mackenzie of Rosehaugh being lately dead, he was not only one of the heirs-portioners, and of line to him, but likewise by Sir George, his grandfather's tailzie, was now the nearest heir of tailzie to him existing for the time; for, though a second son of Lady Langton's body was preferred to him, who had no second son, therefore there was nothing to hinder him from entering heir of tailzie; and having taken brieves out of the Chancery for serving himself, it was necessary he should have access to the charter-chest for getting out the retours, charters, and saisines, for instructing the service; therefore craved the Lords would allow the charter-chest to be opened and inspected at the sight of one of their number, and the writs to be inventoried, and such of them as were useful to expede the service delivered to him, upon his receipt to make them forthcoming to all parties having claim thereto. Answered for Lady Langton, and Sir James Mackenzie of Royston, now her husband, That though my Lord Mountstewart be the nearest heir of tailzie presently in being, at the time of the devolution of the sucession by Rosehaugh's death; yet it is only failing of a second son of Lady Langton's body, which is both possible and probable to exist, she having an elder son, and bearing children every year, and is presently with child: and the law says, *fœtus in utero habetur pro jam nato, ubi agitur de ejus commodo;* and she has raised and executed a declarator against my Lord Mountstewart, on this ground, that he cannot serve heir so long as there are hopes of a second son of her body, and that his right must irritate, resolve, and extinguish in that event; and as to the charter-chest, she consented to the opening, inspecting, and inventorying the writs, but not to be delivered up in order to serving of brieves. Replied, there was none in being at present to compete with him; and to stop his service, was to leave the estate in confusion, waiting for an uncertain event which might never exist; for who shall manage and administrate *medio tempore*, uplift the rents, and pay the debts; and the property could not hang *in pendente* like a fiar in the air; and therefore craved he might have access to the writs necessary for the service, and he would answer the declarator when it came in regularly by its course. *Duplied*, This might prejudge her cause, et satius est in tempore occurrere, quam vulnerata causa remedium quærere; and if he were once served heir, and infeft, he might pretend now that he was stated in the absolute right of the estate, and no subsequent existence of a second son of Lady Langton's body could irritate or annul his right, not having existed at the period when the succession opened by George Mackenzie the last fiar's death. The Lords remembered, that the like case had twice occurred before; once in 1647, betwixt Major Ballantine of Corehouse, and Marion Weir, daughter to the Laird of Blackwood *; and more lately, in February 1677, betwixt David Melville, now Earl of Leven, and the Earl of Rothes, then Chancellor, No.

* This case is mentioned in No. 25. p. 14880.

No. 32. 25, p. 14880. where David Melville's service was stopped by the Lords, during the possibility of the existence of a second son of the Chancellor Rothes' body, though he had not so much as a first son at the time, and small probability of any, his Lady being past child bearing.——Yet Stair himself, and sundry others of the Lords differed, thinking the heir in being at the time could not, upon such an uncertain *spe*, be hindered to enter. And Sir George Mackenzie, in his *Idea Eeloquentiæ forensis*, having recorded the same case, page 150. seems to be of the same mind, which is so much the more to be regarded, that he is the maker of this tailzie now in question, and would not readily impinge on the same rock. The Lords named Cesnock to oversee the opening and inventorying of the carter-chest; and to allow both parties inspection, and to put in the clerk's hands what was necessary for the service, seeing they could not take in she declarator summarily; but if the Lady Langton thought herself concerned, the might either crave assessors to be joined to the macers, to regulate any debate that might arise, or else procure advocation of the brieves, which would bring in the whole matter to be summarily discussed. My Lord Mountstewart might have either extracted his predecessor's saisine and retour, or produced the register-books. But the Lords did not think it reasonable to put him to that expense.

Dame Margaret Haliburton, Lady Rosehaugh, and my Lord Prestonhall, now her husband, likewise gave in a bill, shewing, that she was named executrix and universal legatar by his son George Mackenzie's testament, and so had right to all the moveables; and therefore craved inspection and delivery of the writs in order to confirm, which the Lords granted, reserving all parties rights, as accords.

1708. *January* 2.—The declarator pursued by Sir James Mackenzie and his Lady, against my Lord Mountstewart, mentioned 13th November, 1707, was this day advised. Sir James and his Lady insisted to have it declared, that, by her father Sir George's nomination of tailzie, her second son was preferred to my Lord Bute's eldest son; and therefore the said Lord Bute's eldest son could not be served heir to Sir George, so long as there is a possibility and hope of a second son of the said Lady's body; and therefore his service behoved to stop during the dependence of that event. Alledged for my Lord Mountstewart, That he had no legal contradictor, for my Lady Langton herself was neither called as institute nor substitute; and for her second son, he was a *non ens*, and at best an *ens rationis*, a possible being, which might never have an entity in nature, and so there was none that had title nor interest to pursue this declarator; whereas in Rothes and Melville's case, Sir William Bruce, as donatar to the non-entry, carried on the process; and such thin fancies and possibilities can never support this action. Answered, The mother's interest was sufficient to found this process, though her second son was not yet in being; for, in such cases, *habentur pro jam natis*. The Lords ordained the debate to proceed; whereupon it was farther alledged for Mountstewart, That the capacity of an heir to succeed must be considered precisely as it stands *tempore devolutæ successionis*, and as it is at the time of the last fiar's

decease; now, there being no second son existing at present of my Lady Langton's body, my Lord Mountstewart, the next branch of the tailzie, cannot be hindered to enter, on the expection of a fancy that may never have a reality, or existence; and these words *quibus deficientibus*, or whilk failing, are only applicable to the present time, without any regard to futurities, as appears *per L. 5. De Vulg. et pupill. substitut.* and *L. 28. D. Ad leg. falcid.* And as this is consonant to the common law, so it quadrates precisely with our practice; for, suppose a son die, his father can instantly serve himself heir to him, though he may very probably have other sons afterwards, which if they had been existent at the period of the devolution and delation of the succession, would clearly have debarred the father; yet the law does not suspend his entry on that possibility and eventual hope, but allows him presently to serve heir. And the same holds where a son dies, leaving a consanguinean brother, who may instantly serve and enter, though his father may afterwards beget a full german brother to the defunct, who, if he had been *in rerum natura* at the time, would have excluded his brother consanguinean, as being *ex utroque sanguine* to the defunct; but law will not put the half-brother to wait such impossible uncertain events as may never come to pass. And to suspend the nearest heir *pro tempore* from immediate entering, draws a train of inconveniencies and confusion alongst with it, more than the Trojan horse had of soldiers in its belly; for how shall vassals be entered, creditors' diligence proceed, and the estate be administrated? neither does a *curator bonis* salve the case. And Sir George himself saw these shelves and rocks, and, like a skilful mariner, avoids them, both in his manuscript track on tailzies, and in his pleading this individual case in his *Idea Eloquentiæ forensis*, though he was for Melville who lost the cause, yet he concluded with Lucan in the Pharsalian battle, *victrix causa diis placuit, sed victa Catoni*; and it seems to be a controuling of Providence, that where God has not thought fit to bestow an heir at the time the succession opens, yet that heir must be still waited for, though for a tract of many years.—Answered for Lady Langton, that the instances adduced are altogether foreign to the present debate; for these *additiones hæreditatis* mentioned, are all *successione legitima ab intestato*, but nowise hold in tailzied and conditional fees; for, put the case, one were named to the fee of a tailzied estate under the express condition, if he marry such a woman, will not the fee be pendent till it appears whether he purify and obey the condition or not? And the law affords many such examples; and put the case, when Sir George Mackenzie's son died in October last, that his two daughters had been both alive, and neither of them had a son, will any man dream that Sir George designed that Mr. Sim, or his brother's son, the next branch of the tailzie, might immediately serve heir, and enter to the seclusion of his daughters' sons. Certainly no; but he would have said, let him wait till it appear that the sons by my two daughters fail. Neither is this doctrine new; for Anton. Peregrinus, a famous Italian lawyer, in his commentary *De fidei commissis*, *Art. 22. N. 73.* states it *in terminis*, and resolves it in her favours, that the heir nearest in being, must expect the possible heir, till he totally fail; and so does the learned Voet. *ad tit.*

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No. 32. *Dig. De hæred. instit. Art.* 12. Even so Sir George's two daughters being married into two ancient honourable families, Bute and Langton, and he was to anxiety solicitous that his own memory, representation, and estate, should not be swallowed up and confounded in theirs, by their eldest son's succeeding to him; but in his nomination he sets his invention, which was not small, upon the rack, to keep them separate, and to avoid this jumble, which hazarded the extension of his own. It is true, the Roman law was somewhat nice, in allowing the institutions of an *incerta persona*, or a posthumous, yet the posterior constitutions mitigated this rigour; and the customs of all the European nations have now receded from these notions, that had more the character of subtilty, than of solid justice.

Replied for my Lord Mountstewart, that the nice subtilties and fictions of law stood more in my Lady Langton's pleadings than his, who run all upon remote possibilities and non-entities, *cujus nulla sunt accidentia*, and *dominium* being the correlate term to a *dominus* or proprietor. Here there is neither *in rerum natura* as yet, but a *dominium* of a large estate *sine domino;* and by the French law this is made very plain, where *le morte saisit le vif.* as Tiraquel has learnedly explained it, no sooner is the breath of the last fiar out, but the next heir in being is without any formality invested and seised by his predecessor's death; so that there is no waiting for possibilities, so great an abhorrence has law against property being without a master; and in the stile of our brieves of mortancestry, he who is the nearest at the time must be retoured by the inquest to be the legitimus et propinquior hæres, he being proximus quem nemo antecedit; and they cannot regard the imaginary right of possible heirs. And as to the citations from the lawyers, Peregrinus only warrants his assertion by the authority of Ludivicus Romanus, and cites Paulus Castrensis, and Alicatus, against him. The question was stated, Allow my Lord Mountstewart's service before the macers to go on, or stop it during the possibility of a nearer heir; and it carried unanimously, nemine contradicente, That the service should proceed without any more stop. But sundry of the Lords explained themselves, that this service would not cut off my Lady Langton's second son, when he came to exist; but that he would have good action to compel him to denude in his favours, and his birth would terminate, irritate, and annul his service. But *beati possidentes*, for he possesses *medio tempore;* and accordingly Sir James Mackenzie did protest, that his service should not prejudge the Lady's second son, if ever the same shall exist. The Lords wished this might be made a standing rule for all such cases in time coming, and be observed as strictly as if an act of sederunt were made thereupon, that there might be no more wavering back and forward, on the pretence of favourable circumstances varying the case, unless the tailzie bore an express suspension of the heir's entry, during the possibility of the existence of the nearer and dearer heir called; for then the defunct's will, though inconvenient, must be obeyed.

1709. *December* 6.—This is the famous debate and competition for the deceased Sir George Mackenzie's of Rosehaugh's estate, betwixt his two grandchildren.

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The case upon his tailzie and nomination being fully stated *supra*, 13th November, 1707, and 2d January, 1708, we shall here only resume the matter of fact as it has occurred since that decision, and my Lord Mountstewart's serving heir as the nearest branch of the tailzie then in being. About a year after that service, the Lady Langton, now spouse to Sir James M'Kenzie of Royston, bears a son, which being her second son, (though of a different marriage) her lawyers were of opinion, that he had now right to his grandfather's estate of Rosehaugh, in so far as the tailzie and nomination preferred a second son of the Lady Langton, his second daughter, before the eldest son of the Lady Bute, who was his eldest daughter, to preserve his estate, distinct and unconfounded with theirs, and to have the representation of a separate family from them; and though he was not existing at the time the succession devolved by his uncle's death, so that my Lord Mountstewart was allowed by the Lords to serve as nearest heir, yet now his right, then only *in spe* and possibility, does actually prefer him to Mountstewart, the remoter heir of tailzie, who is only substitute to him in the nomination. On this advice, there is a summons raised at the instance of the said George Mackenzie, and Sir James his father, and administrator in law, against the Lord Mountstewart for reducing his right and service, and declaring it void, terminated, extinct, and null; and for obliging him to denude in favours of the pursuer, as the nearest heir of tailzie, and to dispone the estate in his favours, in regard it appears by the whole clauses and conception of the tailzie, that Sir George Mackenzie's design was always to exclude any of his two daughters' eldest sons, wherever there existed a second son of any of their bodies; for if my Lord Mountstewart had had a second brother, or shall have a second son, any of these would have been preferred to him; and by the same rule, the Lady Langton's second son must come in before him; which is yielded on all hands, if he had been born when my Lord Mountstewart, in January 1708, craved to serve; and his being born since can never alter the case, seeing Mountstewart's entry was only as a fiduciary or fidei-commissary heir till he should exist; which case having now happened he must denude; and as Peregrinus, Voet, and others cited in the preceding debate, are of this judgment, so also is Ruinus Consil. 161. that the participle nasciturus resolvitur in conditionem si nascantur, quæ cum sit quid indeterminatum omnia tempora comprehendit; and the learned Socinus Consil. 174, to the same purpose, præferendus est proximior, licet nec dum natus, vel conceptus tempore delatæ successionis, etiam ad exclusionem ejus ad quem semel delata fuerat. To which we may add, Guido Papæ in his Decisions of the Parliament of Grenoble, Num. 511. and 612. that when a substitute is called *indefinitè et simpliciter* their existence *quandocunque* debars the next substitute, seeing oratio indefinita pro universali habetur. Alleged for Mountstewart, that he repeated his counter-declarator by way of defence, and contended, that being now served as nearest heir and infeft, he could never be obliged to divest and denude; *semel hæres* in law being *semper hæres;* and if the Lady Langton had had a second son when Mountstewart served, he would have stopped it, and been preferred; yet now he can claim no right, because, though Sir George

No. 32. Mackenzie, the tailzier, has provided for other cases of return and denuding, viz. that Bute's eldest son should denude in favours of his second brother, or his own second son, yet he has no where said in the general, that where a remoter heir is once served, that he shall be obliged to denude on the posterior existence of a nearer, who would have excluded him if he had existed at the time; nor has he provided, that if his eldest daughter's son (Lord Mountstewart) be served, and if thereafter the Lady Langton, his second daughter, chance to bear a son, that the eldest son in that case, shall be obliged to denude in favours of the second daughter's second son; and therefore he must be presumed to have designed no such thing, seeing in law casus omissus habetur pro omissa de industria; et exceptio firmat regulam in casibus non exceptis, especially considering that tailzies are strictissimæ interpretationis, and not to be extended de casu in casum, nor de persona in personam, the 22d Act 1685, introducing them being correctory, and nowise favourable; and Craig, *De Feud.* p. 247. 248. and 250. tells us, tailzies are odious, cutting the lineal succession, and not to be extended by consequences beyond the precise words; and so did the Roman law restrict *fidei-commissa*, as appears, per L. 46. D. De hæred. instit. et L. 77. D. ad S. C. Trebell. And Celsus says elegantly, L. 7. § 2. D. De supellect. legat. that the words must be attended to; for though, potentior est mens dicentis quam vox, yet nemo sine voce dixisse existimatur, and therefore in re dubia melius est verbis edicti servire; and where there is no ambiguity, non debet admitti voluntatis quæstio, L. 25. § 1. D. De legat. III.—Ambiguity, (as Festus derives the word) is quando in ambas partes agi potest, when a word can admit two or more senses; but Sir George's expressions are here plain, that he would have no pendency of his estate, the ill whereof he had seen in Rothes' and Melville's case, which he has printed in Latin; and in case of his second daughter having a second son thereafter, he has provided no regress nor return; and such a case would occasion vast inconveniencies and confusion, for *esto* Mountstewart should now denude in favours of this infant, he may possibly die, and so Mountstewart must be re-infeft again. Then suppose that the Lady Langton bears another son, Mountstewart behoved again to denude to him; and *quid juris* if the Lady Langton's eldest son came to die, then this boy would be no more her second, but her eldest son, which draws such a train and consequence of inextricable difficulties, that it would subvert all our styles in services of heirs, that writers would not know to form their brieves; and therefore we must adhere to the precise words, without wandering into remote conjectures, and the Lords must so determine, as an act of sederunt in 1613 ordains in expounding irritant clauses, and did so in the case of Borthwick of Cruickston, in July, 1694 *, and lately on the 26th January, 1709, betwixt Muirhead and Hill *. And to decide otherwise, were to cast dominion and property loose, as Sir George Mackenzie argues, not only in his printed pleading, but in his manuscript tractat about tailzies; and it is a certain principle in law, that the property of the estate being now settled on my Lord Mountstewart, there it must stay and remain, till it devolves either by succession after his death, or be altered by some deeds of the proprietors; for, quod

* See APPENDIX.

meum est sine facto meo a me auferri non potest; and this cannot be shaken by the loose ungovernable doctrine of consequences and conjectures, to bring in the second son of his second daughter's marriage, Sir George having nothing in view but his two good-sons Langton and Bute then existing, and never dreamed of their second marriages; so that the interpretations made by Sir James Mackenzie for his son are nothing but unwarrantable extensions and imaginations, nowise expounding a tailzie, but truly drawing and making a split new one out of their own brain. Answered for the Lady Langton's son, now pursuer, That, by the whole contexture of the writs, it was evident, nothing run so anxiously in Sir George Mackenzie's thoughts as the making his estate distinct from the two families in which he had married his daughters, that it might not in any case be swallowed up in theirs, so that is the *regula regulans* of the whole nomination; and it was needless for him to express a general return from a remoter heir to a nearer when he existed, for that is sufficiently done by the order and series of the nomination, where the second sons are ever preferred to the eldest, who are only called *ultimo loco*; and his providing against a pendency in one case sufficiently proves his design to have it take place in all, as Menochius, præsumpt. 179. Lib. 4. Num. 30. says, Provisio et conditio adjecta in uno casu substitutionis præsumitur repetita in altero; and Molina, Lib. 1. Cap. 4. Num. 18. adds, that voluntas et intentio defuncti attendenda est, etiamsi ad specificum casum defunctus non transierit; and Menochius, præsumpt. 73. Num. 5. id habetur pro disposito de quo si defunctus fuisset interrogatus verisimiliter respondisset se ita velle, which Sir George himself expresses very prettily in his fore-cited pleading, p.154. ille sensus omni scripturæ adaptandus est quem proferens ipse vero similiter expressisset si dubium ei fuisset clare enucleatum. Sic Cicero orat. pro Cæcinna, verba quotidiana et familiaria non cohærebunt si licet ea captare et aucupari. And my Lord Mountstewart's being in the fee is a sophistical argument against his denuding, else it would militate as strongly for Mr. Simon Mackenzie, the last branch of the tailzie; for let us suppose, at Sir George's son's death in October 1707, his two daughters had no sons alive, then Mr. Simon, as the nearest then in being, might have served heir; after which both the daughters came to have sons; and they pursuing him to denude as nearer, *et magis dilecti* by the tailzier, than he, his answer would be the same that my Lord Mountstewart makes now, if you had been born before I entered, you were undeniably preferable, but now you come behind the market, you are an untimely birth; I am stated in the property, Sir George has provided no redemption from me: And by my Lord Mountstewart's argument, he behoved to carry it, though there can be nothing more absurd, than to think Sir George designed to prefer Mr. Simon, his brother's son, before his own grandchildren; and can there be a greater quiet, ease, and contentment, (next to our soul's concern) when we are dying, than to think our fortunes will go to our posterity, that being the only way whereby we flatter ourselves in the continuance and perpetuity of our names, possessions, and memories, after we are dead; and therefore the laws of the twelve tables gave great latitude in testing, *uti quisque legassit ita jus esto*, though

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No. 32. now it is somewhat restrained; and even our disposal is to take effect at a time when it is no more ours, viz. after our death; and my Lord Mountstewart's lawyers confound the legal succession with the conventional, which stand upon quite different rules; for a father may serve heir to his son *ab intestato*, though afterwards he may beget another son who would have excluded him, if he had been born when his eldest brother died; but this nowise holds in tailzied successions, where the will of the defunct overrules all, et tollit legis provisionem; and all agree that voluntas defuncti interpretatione et extensione juvanda est, et magis attendenda quam prolatorum verborum qualitas, though it be neither *dictum* nor *scriptum*, as Molina has it; and it is a gross mistake that the Roman law did not extend *fidei-commissa de casu in casum*, for we have the express contrary in L. 22. D. ad S. C. Trebell. and done upon no less authority than the Emperor Marcus Aurelius, his decision *in auditorio*; and as to the inconveniencies urged from the frequent revolutions and devolutions tossing property from hand to hand by this scheme of denuding, it is answered, This can never be remedied till heaven's statute law of mortality be reversed; for it is confessed my Lord Mountstewart must denude in favours of his own second son when he comes to have one, and on his decease must he not be reinvested again; and supposing he begets another son, must he not of new denude to him; for these inconveniencies when nearly viewed disappear and evanish like shadows and apparitions of ghosts, and have no reality in them at all, however busked up in a frightful disguise. And if any will ponder the reasonings in the two cases of this kind that occurred before, viz. Major Ballantine of Corehouse and Marion Weir, Blackwood's daughter in 1647, and that of Rothes and Melville in 1677, recorded by Stair, and contained in Sir George Lockhart's information yet extant thereon, they will find the same favour the pursuer's conclusion of denuding in favours of a nearer heir whensoever existing, though long after the devolution, and the remoter heir's actual entry and possession; and it requires but a small insight in the Roman law, to observe that *fidei-commissa* are most amply to be interpreted vel ex conjectura pietatis et commiserationis vel ex dilectionis, et amoris ordine, which favour is by the Emperor Constantine, in L. 1. C. De Sacrosanct. eccles. extended to testaments and latter-wills.—Replied for Mountstewart, That the tailzier had certainly the case of returning and denuding under his view, for he has provided for it in two cases by fide-commissary clauses in his nomination; and not having mentioned this of the eldest son's denuding to the second daughter's second son, (which was obvious as any of the other two,) it is plain he never designed any such thing; and to run to extensions, conjectures, and remote consequences in these cases, were to unhinge, subvert, and unsecure all property; for bring it once to the footing of interpretation, then, though our understanding be finite, yet our conjectures in reasoning and judging are infinite; for, what to one man seems a just and probable settlement of an estate, will to another seem unreasonable; and so every man's view of reason is of equal authority, when the matter is once brought to what every man thinks best; reason having as many changeable and various appearances as there is diversity of faces in the

world; and so when we pretend to interpret men's wills after they are dead, we fall into downright guessing and divination; and instead of the granter's will, we substitute our own fancies and chimeras, and we make men burden their properties with clauses, when it is no more theirs, but by a fair succession become another man's; these *onera* and *gravamina* being against the nature of property, the will and views of men being so vastly different and abitrary, that no man's judgment and will can be an adequate rule and measure to that of another; and the glosses and inferences here offered are not interpretations, but truly the supplying and making up of clauses which they want, and which none could do but Sir George the tailzier himself, which he has not thought fit to do; and was too great a lawyer to insert clauses that would have occasioned such a desultory transmutation of property, skipping from line to line, branch to branch, and from one person to another, and dance attendance on imaginary conjectures, on events that may never exist, at least not for hundreds of years after this, which cannot but produce violent and convulsive effects, for disquieting and unsettling the minds of people in transmitting their properties, depriving the heirs of tailzie of enjoying the comfort of what is their own, and frighting others to contract with them, lest, by these invisible machines, their rights may be avoided, irritated and torn from them. The learned Voet, in his commentary *ad S. C. Trebell.* has a case parallel with this in hand. A father having two sons, institutes them both his heirs, but burdens the one to restore his part of the heritage to the other, if he die without children. The other he appoints to restore his share at his death, without any mention of that condition, whether he have bairns or not. Voet says, He must obey the trust though he have sons, because he has mentioned the condition that he shall only restore si sine liberis decesserit in the one son's case, and omitted in the other, and gives this reason for it, quod dici necuit de liberis non cogitasse, when he makes express reservation in their favours as to one of the sons, and not in the other. Just so here: Sir George Mackenzie, the maker of the tailzie, had two cases of return expressly under his view, and thought not fit to extend it to the case now under debate, and so the Judges may not do it for him; that were not to expound his tailzie, but to make up a new one, which he never dreamed of. But I find Socinus, *ubi supra*, calls their interpretations of clauses in writs not so much extensions as *comprehensio*, a comprehending and taking in all parallel cases within the sense of the words, and drawing them within the verge and compass of a legal extensive interpretation, which all the Doctors and interpreters allow. The elegant author of Les loix civiles redigèes dans leur ordre naturelle, tom. 3. § 7. has a notable observation to this purpose; that besides the difficulties arising in the exposition of testaments, or other writs, through the obscurity or ambiguity of words, there were sundry other cases emerging from unforeseen events, which the party could easily have obviated if it had occurred to him, and which must be explained by presumptions drawn from the testator's meaning and design, and what he has done in the like cases; for variety of circumstances must necessarily infer different rules of interpretation of the defunct's will; so that *esto* there were neither

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No. 32. obscurity nor ambiguity in Sir George Mackenzie's nomination, yet there is plain and evident ground to draw it to the case of the Lady Langton's second son now existing, as clearly falling under his enix will to have him preferred to his daughter's eldest son. My Lord Mountstewart's lawyers insisted very much on the legal succession, where, it is uncontroverted, that denuding on supervenient existing never took place. As for example, a father succeeds to his only son, and is served heir; after this, he begets another son; it is certain, if that son had been *in rerum natura* when his eldest brother died, he would have excluded his father; but *semel exclusus est semper exclusus*, and he can never compel his father to denude. Sicklike, a brother dies, having a sister-german; she serves heir to him; after this, her father begets another son, who would have excluded the sister if he had been existing *tempore delatæ hæreditatis*, but she being once entered heir will continue so, being under no obligation to denude. And this being a principle, it was contended by Mountstewart it ought, *ex paritate rationis*, to have the same effect in the conventional and tailzied succession. Answered, There was a vast disparity, for in the succession *ab intestato* the law was the rule; but in conventional ones, we must proceed on the presumed will of the defunct, which in the legal has no place; for there can be no presumed will where there is no will at all; seeing, in the legal succession, the defunct has given no indication of his mind, neither by word nor writ, and so it can never be the rule in the legal, but must over-rule and determine all substitutions in tailzies.

1709. *December* 13.—The Lords advised the cause between George Mackenzie and my Lord Mountstewart, the debate whereof is largely marked *supra*, at the 6th December, 1709. After long reasoning, it came to the stating of the vote, and some were for putting in all the grounds of law whereon the pursuer and defender founded; but it was thought that would embarrass too much, therefore it was restricted to this single point, if the tailzie and nomination imported a *fidei commiss.* upon my Lord Mountstewart in this event of my Lady Langton's having a second son, so as to make him only a fiduciary heir in that case. The next was, there being two conclusions in the pursuer's declarator, one to reduce, irritate, and annul Mountstewart's right, and the other to oblige him to denude in the pursuer's favours; it was long debated, whether, on the supposition of his being found a trustee, both his right should be declared null, and he decerned to denude, or if only they could insist for one of the two, and which should it be. It was thought to crave both was incompatible and inconsistent, and to insist for declaring his right null was incongruous, seeing he was undoubted fiar, ay till the Lady Langton's second son was born; and the right was legally in his person to stop the pendency; therefore it was agreed, that if the Lords should find a fidei-commiss. in favours of the pursuer, that the effect of it should be to oblige him to denude of the estate to the Lady Langton's second son, the pursuer. And the vote being so stated, the Lords, by a plurality of seven against six, found the nomination imported a fidei-commiss. by which Mountstewart was obliged to de-

nude in favours of the pursuer. My Lord Prestonhall, as uncle to the pursuer, and my Lord Blairhall, as the defender's uncle, were declined; so the remanent twelve Lords, with my Lord Annandale, determined it, and not being equal, it came not to the President's vote. Some moved it as an expedient to salve and reconcile all parties, that my Lord Mountstewart should possess the estate during his life, at least, till it appear whether he shall have a second son or not, to whom he must denude by an express clause of the tailzie; and failing of him, then the Lady Langton's second son to enter. But this notion, having no warrant in the nomination, was laid aside. No. 32.

1710. *January* 27.—The Lords resumed the consideration of the celebrated cause, mentioned *supra*, 13th December, 1709, betwixt George Mackenzie and the Lord Mountstewart, and after a long hearing, proceeded to the decision of three other points started by the defender. The *first* was, that George had no title to pursue this declarator, he not being the heir called by Sir George Mackenzie the tailzier, in so far as he seems expressly to mean a second son, procreated betwixt Cockburn of Langton and his second daughter, which this pursuer is not; for he passes by his daughters, and fixes on their children, but so as they should be the posterity of the husbands they had at the time, to whom he particularly relates. 2*do*, This pursuer is not properly a second son of the Lady Langton's body, but rather an eldest son of a second marriage, who will succeed to his father's estate of Royston, which was never dreamed of by Sir George Mackenzie, the maker of the tailzie. Answered, This is a strange notion, and a dilator newly invented *ex post facto*, which if relevant would have finally ended this process, and superseded all debate, but is utterly vain; for though the husbands then in being are named, yet the *fons* and *radix dilectionis* was his daughters, who were the procatartic cause, and mid-couple of calling their children; it is *perinde* whether the second son be of a first or second marriage, he is always her second son, and so expressly called in the tailzie before my Lord Mountstewart. The Lords repelled the defence, and found he had a good title and interest to pursue. The second defence was, that by the express conception of the tailzie is only a conditional seclusion of the eldest sons, viz. when the two estates of Bute and Rosehaugh shall happen to concur in one and the same person, which condition has not yet existed, in so far as my Lord Bute being yet alive, Mountstewart can never be said to have succeeded to his father's estate; and many things may hinder his succession. Put the case, the estate of Rosehaugh should devolve on Langton, what would hinder him to repudiate his father's estate, overburdened with debt, and take himself singly to the estate of Rosehaugh? Answered, The right of apparency is sufficient to force denuding without an actual concourse of both in their person; and my Lord Mountstewart has declared his design of keeping both, by designing himself James Stewart Mackenzie, Lord Mountstewart. The Lords found him bound to denude, though he had not yet actually succeeded to the estate of Bute, but had only the *jus apparentiæ* in his person.

No. 32. The third question was, if he could be presently obliged to denude, seeing the fideicommissary clause bore another condition, that he was only to denude in case of his having a second son; and therefore till it should appear whether that event shall exist, (which cannot be known during my Lord Mountstewart's life,) he must keep the possession of the estate; for all lawyers agree, that *si, cum, et quando*, are plain conditions and suspensive, till they be purified. So whatever access this pursuer may have after Mountstewart's death, if he decease without a second son, he can have none till that event appear; and these frequent transitions and transmutations of property are contrary to the nature of dominion, if investing and divesting it may be every other year. Answered, If it be good doctrine, That George Mackenzie must wait the possibility of my Lord Mountstewart's having a second son, and must not enter till that fail, how came it that my Lord Mountstewart did not wait the event of the pursuer's birth, which was the more probable case, but was immediately retoured and infeft, as *proximior pro tempore*, and was not found obliged to wait; et quod quisque juris in alium statuerit ut ipse eodem utatur, is the voice of nature; and if "which failing" was expounded "presently failing" in his entry, why should it receive a suspensive interpretation here, when it is plain Mountstewart as yet has no second son; and why should the one be more waited for than the other; and the inconveniency of frequent transmigrations of property is to accuse Providence, that it has not made things immutable and immortal, the course of human affairs since the Fall being, that property is lodged with one man to-day, and yet the same at his death must transmit and let it go to another, within a short time thereafter. The Lords likewise, by plurality of seven against six, repelled this third defence, and found he behoved presently to denude, and the pursuer was not bound to wait his having a second son or not; and that his denuding was not by the tailzie suspended till that event. Several decisions were adduced to prove the Lords had caused remoter heirs wait the possibility of a nearer, as Carstairs and Ramsay against Carstairs, No. 43. p. 2992. *voce* CONDITION; Straiton against Lauriston, No. 56. p. 418. *voce* ALIMENT; Gray against Forbes, No. 104. p. 12976. *voce* PROVISION TO HEIRS AND CHILDREN; but the Lords decided *ut supra*.

1710. *February* 18.—In the cause mentioned *supra*, 27th January, betwixt George Mackenzie and my Lord Mountstewart, who finding an argument drawn from his retaining that stile, as if he intended to represent both families, therefore he now only designed himself Mr. James Mackenzie of Rosehaugh; the Lords determined two new points contained in a bill given by my Lord. The *first* was, That if he should denude in favours of the Lady Langton's second son, he might incur the irritancy of the tailzie, in case, on his death, it should fall back to him; and he might be quarrelled by Langton, the next branch of the tailzie, as having lost and forfeited his right by that voluntary alienation; and therefore craved an incident diligence to cite Langton for securing himself against that hazard. Answered, The defender's denuding, in obedience to the Lords' decreet, can never be construed a voluntary deed, that can infer a contravention of the tailzie, and the

mandatum judicis is sufficient to defend against any such hazard. The *second* objection was, That he is pursued at the instance of sundry of the last Rosehaugh's creditors; and if he be obliged to denude in favours of this pursuer, yet that will not liberate him from the creditors, *semel hæres semper hæres*, and any thing done here is *res inter alios acta* as to them, and therefore cannot be secure until they be brought into the field by diligence, and he cannot safely denude till then. Answered, As these creditors are few, and their claims very small, so he can be in no hazard, because when a fidei-commissary heir denudes, all actions *tam activè quam passivè* are transmitted to the heir in whose favour he denudes, § 4. Instit. De fideicom. hæreditat. so that all pursuits against the fiduciary heir cease, and are transfused into the other. The Lords found no necessity of citing Langton or the creditors; but ordained George Mackenzie to find sufficient caution to relieve my Lord Mountstewart of all the debts affecting that estate, with which quality and burden they decerned him to denude; for it was thought, if he happened to have a second son, and were pursued to denude to him, he might obtrude the same defences against performance, and yet they would be evidently unreasonable in that case, and even so here. No. 32.

When this was determined, my Lord Mountstewart applied by a new bill, offering to prove *scripto*, under Sir George Mackenzie's hand, that he had appointed, in case the eldest son of his eldest daughter should succeed, he should not be obliged to denude in favours of a second son of a second daughter, till it should appear whether he had a second son of his own body; and craved a term to prove it. Answered, The allegeance was false and calumnious, and proponed with no other intent but to stop his decreet, and to put off the Session, and so retain the possession of the estate in the mean time; and if he had not retired out of town, on purpose to shun it, he would have redargued the allegeance presently by his oath of calumny, that he had no other paper under Sir George Mackenzie's hand, but only the tailzie and nomination to prove it, both which have been so oft under the Lords' special view and consideration; and this was only to trifle and gain time; and he had designedly withdrawn, that it might not come to a present trial, but to bring the former decision to be canvassed again of new, and to fetch all over head again, as if it had not been so oft determined and adhered to. When the Lords were going to consider whether they would give a term to prove this new allegeance, or oblige him to prove it instantly, behold the Divine Providence interposes, ranverses all that has been done, and puts a stop to the extracting this decreet, by the news sent from London, that Sir Archibald Cockburn of Langton, the pursuer's elder brother, was dead there. Whereupon Mountstewart gives in a fifth bill, bearing, That George Mackenzie the pursuer's right and title to force him to denude were now extinct, he being no more the Lady Langton's second son, but her eldest, to whom Mounstewart, by the tailzie, was clearly preferable; and therefore craved a decreet in his own declarator, and an absolvitor from George Mackenzie's. Upon

No. 32. this the Lords stopped the decreet against Mountstewart, and laid over the affair till June.

Fountainhall, v. 2. p. 399, 412, 533, 541, 560, & 569.

*** Forbes reports this case:

The deceased Sir George Mackenzie of Rosehaugh, Lord Advocate, " disponed his estate, failing heirs-male of his own and his son's body, to the second son of Agnes Mackenzie, his eldest daughter, married to the Sheriff (now Earl of Bute), and the heirs-male of his body; which failing, to her third, fourth, and remanent sons, and the heirs-male of their bodies, in order after other, according to the priority of their birth; which failing, to the second, third, fourth, and remanent sons of Elizabeth Mackenzie, Sir George's second daughter, then spouse to Archibald Cockburn younger of Langtoun, (now to Sir James Mackenzie of Royston), and the heirs-male of their bodies *successivè*, according to their birthright; which failing, to the eldest or only son of the said Lady Bute, and, after his decease, to his second, third, &c. sons, in the order above-mentioned; and failing of these, to the heirs mentioned in the tailzie." George Mackenzie, only son and heir to Sir George, having died without heirs of his body, and neither of the daughters having a second son, my Lord Mountstewart, the eldest daughter's only son, raised brieves out of the Chancery for serving himself heir of tailzie to his uncle. Sir James Mackenzie and his Lady applied to the Lords for a stop to the service, till they were heard for their interest; and a hearing in presence being appointed, it was alleged for the Lady Mackenzie, That my Lord Mountstewart cannot be heir, so long as there is any hope or possibility of a second son of her body.

Replied for my Lord Mountstewart: My Lady Mackenzie, having no second son in being, had no interest to quarrel his service; for, by the common law, the capacity of an heir must be considered *tempore devolutæ successionis*, L. 5. D. De Vulg. et Pupil. substit. L. 28. D. Ad L. Falcid.; and the word " failing," or *deficiens*, by all the rules of grammar and common sense, is only applicable to the present time. *2do*, It was never heard, that a remoter heir was to delay his embracing the succession devolved upon him, till all the possible events of a nearer were discussed and purified. On the contrary, by our practice, the nearest heir in being when the succession falls is preferred; as a father will be served heir to his own son, albeit he the father be in a capacity of getting children, who, if existing at the brother's death, would exclude him. *3tio*, This would be contrary to the presumed intention of Sir George, who is not to be supposed to have designed his estate to be any time without a proprietor, or his family unrepresented, whereby many rights and debts, for want of one having title to pursue for them, might be lost by prescription; or to counteract his declared opinion in his Idea Eloquentiæ Forensis, and in his Treatise of tailzie; besides, that he has expressly determined the point by two clauses in the tailzie, whereof one provides, " That if the estate

should fall to the second or younger son of the second daughter, while the eldest daughter has no second or younger son, he shall have right to the mails and duties thereof, till the existence of a second son of the eldest daughter;" whence it is clear, that Sir George designed the nearest existing heir to succeed in the *interim*, notwithstanding of a nearer *in spe*. The other clause runs thus, "That if the second son of either of the daughters or their descendants happen to succeed to the estate of Bute or Langtoun, or the estate of Rosehaugh fall to either of their eldest sons, the person so succeeding and his heirs shall be holden to denude of the estate of Rosehaugh in favours of his second son, whenever he shall happen to have one;" which argues Sir George to have had in his view the succession of the eldest son of either daughter when a younger did not exist at the time of the last heir's decease. *4to*, The Chancery is bound to give out breives to any apparent heir applying; and the Judge competent and Inquest to whom these are directed are under a legal necessity to serve the bearer heir *affirmativè*, he proving himself to be *legitimus et propinquior* of line, tailzie, or provision, at the time, which my Lord Mountstewart certainly is, seeing *proximus est quem nemo antecedit;* for the Inquest cannot look back to those things *quæ in jure tantum consistunt*, nor look back to possibilities, which are not the subject of their cognition. *5to*, It is a principle in the law of all other nations, that the immediately existing heir should be entered, that property hang not in uncertainty; for example, in France, *le mort saisit le vif*, the heir succeeds as soon as the predecessor's breath is out. *6to*, Upon the supposition of making the succession pendent, and hanging up the property in the clouds, many great inconveniencies would follow: Creditors could not be answered, law having provided no rule, in that case, for carrying on diligence: Superiors would want a vassal, and the casualties thereby arising; and vassals would want a superior to be entered by. No. 32.

Duplied for my Lady Mackenzie: Our tailzies and substitutions are so many gradual institutions. By the common law, there are conditional as well as simple institutions, whereof the condition and quality kept the succession in suspense till the condition existed or ceased to be possible; and where children to be procreated are instituted, they were understood to be called conditionally because of the uncertainty of their existence; nor doth the succession *medio tempore* devolve to the next heir, but is pendent; which is also agreeable to the opinion of lawyers, particularly Peregrinus, De Fide-commissis, p. 309, 310. and Voet, Comment. ad D. Tit. De Hæred. Instit. § 12. *2do*, The Lords' decision have fully cleared and determined this point, in the case of the succession of the Earl of Leven, betwixt the Lords Rothes and Melville, No. 25. p. 14880. where no place was found for a remoter substitute, so long as there was hopes of a nearer; and in the practick betwixt Weir and Corehouse, mentioned in the case of Rothes and Melville.

As to my Lord Mountstewart's objections, it was answered, *1mo*, The rule of considering the heir's capacity at the falling of the succession, had only place in successions *ab intestato*, where law calls every one according to the proximity of the blood; but, in the institution of heirs, or tailzied succession, the capacity of

No. 32. persons instituted or substituted conditionally is only considered at the existence of the condition; nor doth any nation allow a greater latitude to persons in the free disposal of their estates, than our law doth in tailzies; whereby most of our ancient families stand, and wherein we regard not the subtilties of the civil law concerning the heir's capacity at the time of the predecessor's death; the superstitious observance whereof would carry away men's estates from their children and descendants, to very remote relations, and perhaps to the Sovereign as *ultimus hæres*. 2*do*, As to the allegeance upon the presumed intention of Sir George, it may be more rationally urged, that his choice should rather be observed, though with the inconveniency of a small surcease of a representative, than that the order of succession prescribed by him should be inverted. It cannot be understood an argument of his private sentiment, that when, in his Idea Eloquentiæ Forensis, he sets down the pleading betwixt Rothes and Melville, he enlarges more upon that side for which himself was advocate, which is an usual thing. As to the clauses in the tailzie founded on by my Lord Mountstewart, it is answered, That as Sir George was most anxious to have his family distinctly represented, and not confounded with either of the families of his sons-in-law, so, by the first clause, it is plain, he designed not a general rule; the same not being expressed in general terms, but only in the terms of a particular instance, carrying its own reason of specialty, viz. that his estate might not be in suspence while the competition runs betwixt two sons, whose preference, perhaps, was indifferent to him, his family being distinctly represented by either of them. But it is a quite different case here, where a second son and the eldest of another is competing, whereof the latter would confound his grandfather's estate with his own. As to the other clause, Sir George's anxiety that the eldest sons should denude in favours of their younger sons, doth enforce his intention of keeping the succession distinct, where it was possible; and here there is even a probability of a distinct representative. 3*tio*, The fancied inconveniencies, by keeping *dominium in pendenti sine domino*, are not real; for, in many cases, the exercise of property is *in pendenti;* as in all suspensive conveyances, and where a *nasciturus* is instituted. Have we not instances of a tailzie made upon condition, that the heir should marry such a person, whereby the succession behoved to be pendent till the event of the condition? In all which cases, law conjoins the entry of the heir conditionally instituted with the predecessor's death, who, during the interval, is represented in some measure by the *hæreditas jacens*. As to the prejudice drawn from the case of creditors, superiors, and vassals, and the loss of rights through prescription, for want of one entitled to pursue, there is a remedy for all this, by a *curator bonis dandus*, who finds caution, and acts as the proprietor, save that he cannot alienate; as a tutor acts for a pupil. And as creditors may be thus paid, so there is no question but they might affect the estate itself by declaratory actions and adjudications. For though the usual form doth not exactly quadrate with this, our law is not so barren but it may be adapted to exigencies. The case of the superior's wanting a vassal is but what frequently occurs: His non-entry duties, or other

annual prestations, may be satisfied by the administrator. As to the greater casualities of feudal delinquency, no objection can be drawn from these, seeing what arises from the nature and condition of the fee is consented to by the superiors in their granting infeftment. No. 32.

Triplied for the Lord Mountstewart: No manner of reason can be assigned for the least difference, as to this point, in the tailzied from the legal succession; seeing the "which failing" expressed in the one, is nothing else than the actual failure in the other, according to the degrees appointed by law. Nor is it so much the preference of one heir of tailzie to another that the disponer regards, as the having himself represented, and his memory preserved: And though a man may project whom and what degrees of persons he would have to succeed him, GOD alone disposes of these events. It shocks religion, as well as law, to interpret the will of defuncts so precisely, as to wait still for the heir called and marked out by their tailzie, though it should not please the LORD to bestow such an heir. It is also certain, that the general rules by which the legal succession is regulated, must take place in the tailzied; Menoch. Consil. 198. N. 14. And the reason of the law, viz. that the defunct should not want a representative, and manager of his estate, or that creditors may have a person to pursue for their debts, is equally concluding in both kinds of succession. It is granted, that where it appears to have been the manifest will of the tailzier to have the fee in pendency, it may be pendent; but where no such evidence appears as can exclude all manner of doubt, *præsumitur pro lege.* As to the authority of the lawyers adduced for the possible heir, Peregrinus decides nothing in this matter, but only relates the different opinions of several lawyers. Besides, it is a general rule to be observed, that the authority of any foreign lawyer is not to be regarded, in so far as he recedes from the general principles of the civil law; otherwise we might introduce the customs and decisions of other nations as our law; which were absurd. Nor doth the citation from Voet meet this case; for the *species facti* proposed by him is, where the heirs to succeed *ab intestato* were substituted to a posthumous child; which, before its birth, was not such a simple possibility as a second son of Lady Mackenzie's body. As to the decision betwixt Weir of Blackwood and the Laird of Corehouse, narrated in my Lord Melville's case by my Lord Stair, Instit. p. 476, (497.) the same makes for the Lord Mountstewart; for there the service proceeded, and the point of denuding afterwards, upon the existence of an heir of Marion Weir's body came to an arbitration; but here the point of denuding is not the case; for which dispute there will only be place when the possible heir exists. As to the Earl of Leven's case, it may be said, with all respect, that it was single and singular, and attended with the specialty of a donatar in the right of the superior. Besides, the matter in effect was transacted; for the small compliment to the Chancellor of the elusory retour-duties was not grudged, nor reclaimed against, where the full rents came to the present heir, and there were no great hopes of his ever being divested by the possible heir. Nor is it to be imagined, that the Chancellor's lawyers would have advised to take a gift of the non-entry, had

No. 32. they thought it practicable to oppose the service. 2*do*, The inconveniencies of waiting for the possible heir are not obviated by a *curator bonis;* for such a curator cannot safely pay or transact debts; neither is his person liable to the creditors; nor would prescription run against him as representing the possible heir; nor yet could he advance provisions to heirs-female, in order to their marriage. So that innumerable inconveniencies would remain suppose a curator should be forced upon the estate, whom it cannot be imagined the tailzier had ever in his view; seeing, otherwise, he would have provided one or more by his own nomination.

The Lords allowed my Lord Mountstewart's service as heir of tailzie to the late Rosehaugh to proceed, notwithstanding the possibility of the Lady Mackenzie's having a second son.

Forbes, p. 213.

*** Dalrymple also reports this case:

Sir George Mackenzie of Rosehaugh tailzied his estate in favours of his only son and the heirs male of his body, which failing to the heirs male of his own body, which failing to any person or persons he should nominate, appoint, or design, by a writ under his hand at any time during his life, and by nomination relative to the tailzie of same date, failing issue of his own and his son's bodies; and in regard his daughters of the first marriage were already provided, he destinates the succession to the second and younger son procreated, or to be procreated, of the body of Lady Bute, his eldest daughter; and failing of her to the second or younger son procreated or to be procreated of the Lady Langton his younger daughter; which failing, to the only son of the Lady Bute; which failing, to the only son of the Lady Langton, &c.

Sir George and George his eldest son having deceased without heirs male or female after the date of the tailzie, and the Lady Bute being dead, leaving only one son, the Lord Mountstewart; and the Lady Langton having but only one son, but being yet alive, and now married to Sir James Mackenzie, by whom she has yet no sons, the Lord Mountstewart, the only son betwixt the Earl of Bute and the eldest daughter, takes out brieves for serving himself nearest heir toGeorge Mackenzie, the last fiar.

Dame Elizabeth Mackenzie, the second daughter, and her husband, raise a declarator that there can be no access to the Lord Mountstewart to serve so long as there is hope of a nearer heir, viz. a second son of her body.

The Lords having appointed assessors to the macers, who having reported the debate in that declarator for stopping the service, and thereupon a hearing being allowed *in præsentia* and informations, it was alledged for the Lord Mountstewart, that the nearest heir existing the time of the devolution of the succession is only considered by the civil law and ours, for which the laws and practice of both were cited, and especially by our law a father succeeds to his son failing brothers or

sisters of the son, albeit in that case there must always be a nearer heir *in spe;* No. 32.
for if the father should have a son or daughter, that son or daughter would be nearer to the deceased son, or if a son should die, leaving a brother or sister consanguiuean, his father and mother being still on life, the brother or sister consanguinean would serve, though there be a nearer heir *in spe*, viz. a brother or sister by both bloods. *2do*, The presumed will of the defunct should regulate this case and all others of the like nature, and no man is presumed to be willing that he should be unrepresented for any period of time, much less for such a long course as might happen; for in this particular case both the daughters were but young when this tailzie was made, and their brother a very tender child from his birth; now suppose he had died a child, and that both the daughters had but each an only son, as it did truly happen, neither of these sons could have served till after the decease of both the daughters; for though by the common course, a woman has no children after fifty, yet by the presumption of law the succession would be suspended to the death of the longest liver, though she attained to a hundred years of age, which no man will allow in his succession. *3tio*, During all this uncertainty the property would be in the clouds, or *dominium sine domino*, there would be no superior to enter his vassals, or no vassal to be entered by the superior in that property, no debtor to pay creditors, nor to be subject to any action, nor no creditor to receive payment, or prosecute necessary actions. *4to*, The style of the brief is to inquire *Quis est legitimus et propinquior hæres*, which only can be retoured for my Lord Mountstewart, and our style, which is much to be regarded, takes no notice of possibilities.

To all which it was answered: *1mo*, That the tailzie calls the second son of either daughter before the eldest or only son, and the express will of the testator or maker of the tailzie is the rule of succession. It is acknowledged, that there are several laws which import that the nearest heir at the time of the devolution of the succession, is admitted; and also examples, as in the case of a father's succession, where the service would not be suspended upon the hope or possibility of a nearer heir; but the citations that are to be found in the civil law, or the examples that have been or can be condescended on in ours, are only, in puris institutionibus, or, in successione ab intestato, but, in conditionalibus institutionibus, it was otherwise by the civil law, and there is not a more ample liberty of disposing in any nation than in Scotland by our tailzies, which can be made in such terms and upon such conditions as the maker pleases; and here the substitution being *liberis nascituris*, it is a conditional substitution, for it is always uncertain till the event whether or when these children shall exist, and the maker of the tailzie his pleasure being to call heirs unborn to his succession in a certain order upon implied conditions, the order must be observed, and the service suspended until the condition be purified, or the possibility cease.

2do, As often as this case has occurred, so often has it been found by the Lords, that the hope of a nearer heir did suspend the present service of a remoter, as in the famous case of Sir William Bruce, donatar to the non-entry of the estate of

No. 32. Leven, for the behoof of the Earl of Rothes against David Melville, now Earl of Leven, No. 25. p. 14880. where all the inconveniencies now alleged, and all that is now observed, was pleaded by as famous lawyers, and with as much learning, eloquence, and zeal, as any case that hath happened, and was determined by the Bench in favours of the heir *in spe*, and the service suspended, 22d February, 1677; so that the pursuer repeats and oppones that case, and the pleading there stated, in which indeed it happened that Sir George Mackenzie, her father, was employed as a lawyer for the remoter heir, in which his learned pleading in Latin is yet extant, which does evidence much eloquence, but nothing of his private opinion, or otherwise he would have provided better for that case. And there arises a notable argument from the nomination itself, that Sir George intended the rule expressed to be inviolably observed, without anticipating the order of succession on any account; for there he provides, that if at the devolution of the succession there happened to be a second son existing of the second daughter, and but one son of the eldest, in that case the second son of the second daughter is to be admitted, and to denude in favours of the second son of the eldest daughter in the case of his after existence. It had been as easy to have declared in general that the remoter heir existing at the time of the devolution should have been admitted, if that had been intended; but seeing he who had the very case so fully in his mind, did provide against the suspension of the service in one event only, it is plain he intended the rule in all other cases should take place, and in this the exception. A further argument arises from the same nomination, in which it is provided, that if the eldest son of either daughter should be called to the succession, and have two or more sons, then the said eldest son should be holden to denude in favours of his own second son, where the second son of the only son descended of either daughter is preferred to the second son of both the daughters, though the second son of both the daughters be preferred to the succession before the only son of either, whereof the reason is plainly this, because Sir George did not suppose that the eldest son could be served till both the daughters were dead, and thereby no possibility of a second.

The only case more of this nature that happened to fall under the Lords' consideration, was that of Weir of Blackwood against Major Ballantine, where Blackwood having provided the succession to the heirs to be procreated betwixt Major Ballantine and Marion Weir, his daughter; which failing, to her heirs by another marriage, and failing of these, to Major Ballantine and his heirs; and Major Ballantine's marriage dissolving by his death without issue, his heirs were the nearest existing, yet the succession fell to the heirs afterwards procreated betwixt William Lawrie, tutor of Blackwood, and the said Marion Weir. This case is mentioned in No. 25. p. 14880.

This is also agreeable to the civil law, according to the opinion of very famous lawyers, as Peregrinus, Art. 22. Num. 73, 74, 75, and 76; and Voet. D. Ad titulum De hæredibus instituendis, Art. 12. And as to the inconveniencies alleged, a *curator bonis* answers them all, for this curator will sustain the person of the

heir in all actions, defences, and ordinary administration, as well as tutors or curators. No. 32.

And as to the style of brieves, they concern only ordinary cases, but such events as happen from conditional or extraordinary clauses of tailzies are exceptions from the rule.

It was replied: The second son of either daughter is undoubtedly first in the order of succession, if he had existed at the devolution, but there is no imaginable reason, nor any decision, for suspending the succession, except in the case of the Earl of Rothes, and the reasons there or now insisted on are of no solid weight; for it is acknowleged, that by the civil law *in puris institutionibus vel substitutionibus*, the succession was to be considered as at the time of the devolution, and by our law the succession falls to the nearest existing *ab intestato*, though there be a nearer *in spe;* and in successions by tailzies or in conditional institutions the case is no otherwise; but this distinction is only an invention, supported neither by reason nor authority; for what is the rule of succession *ab intestato* but the presumed will of the defunct that he would call his nearest heirs to the succession, and if that presumed will do call the nearest heir existing, though these be a nearer *in spe ab intestato*, for what good reason can it be supposed, that in a succession by a tailzie it should be otherwise. It cannot be pretended that the maker of the tailzie, foreseeing this event, has made a special provision for it, that is to say, he has not thought fit to add a clause to his nomination, that if in any case it should happen that there were a nearer heir *in spe*, the service of the heir existing should be suspended; there indeed the express declaration of the defunct's will would afford an argument rather to introduce a *curator bonis* for obviating the evident inconveniencies, than that the succession should be carried contrary to the declared will of the disponer; but to infer a presumption of the defunct's presumed will from the tenor of such a nomination as this, is without all colour of law or reason, and utterly inconsistent with what is yielded, viz. That in successions *ab intestato*, or otherwise than by tailzies, the nearest existing takes place; for in the case above stated of a father succeeding to his own son as the nearest heir existing preferable to a nearer heir, which might afterwards be begotten of the father, or in the case of the succession of a brother consanguinean preferable to a brother of both bloods which might happen to be afterwards begotten of the bodies of the father and mother of the defunct; in both these cases the line of succession is certain, that by our law the nearest existent is preferred, and by the very same reason, and in this case, and in the case of all heirs of tailzie, the nearest existing must be preferred, because the father or brother consanguinean are called to the succession by the tenor of the investiture, as being either in favours of heirs-male or heirs of line, which investiture by our custom contains institutions and substitutions as the fiar pleases, and when any of these substitutions cuts the natural line, it is called a tailzie. Seeing therefore the nearest heir existing in the line of the investiture is called to the succession, the nearest heir of tailzie by necessary consequence is also called, a tailzie made by the fiar being the warrant of the investiture; in which we

No. 32. differ from the civil law, whereby all the substitutions did evanish the minute that the heir institute entered heir, and failing that heir the succession did devolve to his nearest heir, and not to the person substituted by the testator.

And as to former decisions, two have only occurred which have any relation to this case; one in the succession of Blackwood, which is fully related by my Lord Stair, both in his Institutions, and the Earl of Rothes' case, and it is evident that there the nearest heir existing, viz. Major Ballantine's heir, was admitted to the succession without waiting for the heir *in spe*, and the nearer heir having afterwards existed, the question then occurred how far the remoter heir was bound to denude, which clearly demonstrates that the remoter heir was *in titulo*, which is all the question here. See No. 25. p. 14880.

In the Earl of Rothes' case, it was indeed otherwise determined; but that was a single decision, in which the Lords were much divided, as my Lord Stair doth observe; and there being decisions on both sides, the matter is now to be determined according to the grounds of law, in such manner as there may be a known rule in time coming. If there were need for specialities, this being *quæstio voluntatis*, Sir George Mackenzie's opinion was well known in the case, and excellently expressed in his learned Latin pleading published by him several years after the decision, and transmitted by him to the most famous lawyers abroad, and his opinion is also clear in this matter by a treatise upon tailzies.

And as to the arguments insisted on from other clauses of the nomination, as that in a particular case he calls the nearest existing, and obliges them to denude in case of a nearer; and that in case of the succession of an only son of either daughter, it is provided that the only son should denude in favours of his own second son, which is adduced as an argument that Sir George did not suppose that the only son could succeed, while there was hope of a second son of either daughter, because it is not provided that the said only son should denude in favours of a second son of either daughter who was nearer, but in favours of his own second son in a remoter degree when he should happen to exist;

It is answered: 1*mo*, Sir George did provide particularly in the case that occurred to his thought, that there should be no suspension in the service, and yet in that case the nearer existing afterwards should have the benefit of the succession, which was set down for an example of the rule, but nowise as any exception from it; and the true occasion of that clause was, that at the making of the tailzie his second daughter had two sons whereof the youngest is since dead, and the eldest had but one. 2*do*, As to the case of the succession of an only son, the clause runs thus: "In case it shall happen the second sons of my eldest or second daughters, or their descendants, to succeed to the estate of Bute or Langton *respectivè*, or if my estate shall fall to either of their eldest sons according to the order of succession above-mentioned; then and in these cases, or either of them, and for preserving of my estate entire and distinct, without confounding with theirs, it is hereby provided, that when the same person shall happen to succeed both to my estate and to the estate of Bute or Langton, then, if the person so succeeding shall have a se-

cond son, or how soon he shall happen to have a second son, he shall be bound to denude." Which clause affords no argument or insinuation, as if Sir George pre-supposed the possibility of a second son by the decease of either daughter had ceased, because one part of the clause supposes the second son of either daughter to have succeeded, and that by the decease of his elder brother his paternal estate did also concur in the same person with Sir George's, in which case he does not so much as think fit to oblige the heir of tailzie so succeeding to both estates to denude in favours of another degree that would have been preferable, if the person so succeeding his elder brother had deceased before the succession. No. 32.

And as to the citations from Peregrinus and Voetius, it is answered: 1*mo*, Peregrinus affirms no such thing as is alleged, but relates the opinions of several Doctors, and that the general opinion is, that the nearest heir existing has access to the succession, and relates the opinion of one particular Doctor and his reason, but does not deliver that as his own opinion; and the case stated by Voetius is of a substitute, where there is a *posthumus* of a nearer degree *in utero*, in which case the entry is suspended, and very good reason, *quia pro jam nato habetur*, and in that short interval a *curator bonis* sustains the person of the heir.

2*do*, If any thing could be found either in the civil law, or in the opinion of lawyers upon it, it would import little in this case, because our successions are wholly upon other rules and principles; for, by the civil law, all substitutions evanished by the entry of the heir, and the succession afterwards descended in the line of the heir and not of the testator, unless that the heir did alter the lineal succession by another testament; and therefore there might have been a peculiar reason to have a more special regard to the design of the testator in the entry of the first heir, and if his design to suspend the succession could by any circumstance be collected, it was more reasonable to have suspended the succession by that law than by ours; for by our tailzies, the line continues in the order and upon the conditions expressed by the maker of the tailzie, without regard to the lineal succession of any of the heirs of tailzie further than they are called by the terms of the tailzies. And seeing it is acknowleged, that by our law a father will succeed to his son, or a brother consanguinean to his brother, preferable to a nearer heir *in spe* that may be begotten of the father and mother of the defunct, and that the father is called to the succession by the terms of the investiture or tailzie as the nearest heir existing, and that by the presumed will of the first maker of the tailzie, there cannot remain any shadow of debate in this case, which is entirely upon the same foundation, unless some clear evidence or document could arise from the tenor of the tailzie or nomination, which in this case can never be pretended.

The style of the brieves are also very much to be regarded, and the Lords have such consideration of styles, that they annually enjoin the writers to the signet to observe them, and do censure writers, when they deviate from styles without some positive law or direction.

"The Lords repelled the declarator, and allowed the service of the nearest heir existing to proceed, in which they were unanimous, and did not proceed upon any

No. 32. speciality either of Sir George Mackenzie's private opinion, or upon any particular clause in the nomination, but upon the general ground, that in institutions and substitutions by tailzies the nearest heir existing at the time of the devolution of the succession and service is by the presumed will of the defunct preferable, which they resolved to follow as a rule in time coming; but left the question entire, how far the remoter heir served might be obliged to denude in case of the after existence of a nearer heir of tailzie."

Dalrymple, No. 87. *p.* 113.

1714. *February* 19. SIMPSON *against* WALKER.

No. 33. A sum being provided to a man and his wife, and the longest liver of them two in life-rent, and to the heirs to be procreated betwixt them two in fee; which failing, to the wife's heirs or assignees; and the husband and wife having deceased without children of the marriage, the sum was found to belong to the wife's heirs, and not to her executors.

Fol. Dic. v. 2. *p.* 401. *Forbes MS.*

*** This case is No. 45. p. 5475. *voce* HERITABLE AND MOVEABLE.

1714. *December* 14.

THE CHILDREN of BAILIE FIFE *against* KATHARINE STEVENSON and her HUSBAND.

No. 34.
A bond to the father in life-rent, and a child *nominatim* in fee, which failing, to the father, his heirs, executors, or assignees, found to be moveable.

Young of Winterfield granted a bond of 7,000 merks to Alexander Stevenson and his wife in life-rent, and to their daughter Susanna Stevenson in fee; and failing of the said Susanna by decease, to the said Alexander, his heirs, executors, or assignees, which is the precise conception of the bond.

Alexander Stevenson and his wife being dead, Bailie Fife, tutor to Susanna Stevenson, who was married to her father's sister, takes an heritable bond of corroboration in these terms: viz. "To the said Susanna, and the heirs of her body; which failing, to his own wife, and her two sisters *nominatim*, and the portion of the deceasing to accresce to the survivor.

Susanna Stevenson deceasing without issue, Margaret Stevenson, the only survivor of the three father's sisters, presuming that she had right to the bond, by the conception of the corroborative security, disponed the said sum in favours of Bailie Fife and his children of a second marriage, of no relation to the Stevensons, who do now claim right to the said sum by virtue of the said disposition to their father.

On the other hand, Katharine Stevenson being a creditor to Alexander Stevenson her brother, who was brother's son and heir to Alexander Stevenson, to whom the original bond was granted in life-rent, and also heir to Susanna the original