one of the heirs institute, not of design, but as by chance, the induction went no further than the true design; and it is remarkable, that, in the case there stated, post inductionem tetamentum signatum est, whereby it might be presumed, the testator intended not a total nullity, else why was he careful to complete an imperfect deed? No. 120.

The Lords found, That the tailzie was wholly revoked by the posterior declaration and obligement."

Dalrymple, No. 28. p. 35.

*** Fountainhall's report of this case is No. 38. p. 2284. *voce* CLAUSE.

1713. *June* 23.

WILLIAM SCOT of Raeburn and His TUTORS *against* WALTER SCOT of Highchester and His TUTOR.

No. 121.
A tailzie, while it remained in the terms of a personal right, not perfected by charter and sasine, especially being in favour of heirs to be begotten, was found revocable by the maker of it, without consent of the first institute.

In the year 1686, the deceased Sir William Scot of Harden made a tailzie of his estate in favours of himself, in life-rent, and to Sir William Scot, elder, of Harden, his father, in fee, and, failing of him by decease, to the heirs-male lawfully to be begotten of his own body; which failing, to Robert Scot, his brother-german, and the heirs-male of his body; which failing, to the heirs-male of Sir William Scot, the elder's, body; which failing, to the heirs-male of Raeburn's body. Which tailzie was made with the ordinary prohibitions and irritancies, and particularly, "That it should be nowise lawful to the said Sir William Scot, elder, and the heir of tailzie and provision above-written *successivè*, in no time coming, to alter or infringe the same, nor to sell, annailzie, dispone, or put away, &c. And in case the said Sir William Scot, elder, or the heirs of tailzie above-mentioned, should happen to contravene, then, and in that case, the deeds done by them should not only be null, but they and their descendants should lose and forfeit their right, and the estate devolve upon the next heir of tailzie." This bond of tailzie was registered, July 15, 1691, and inhibition served thereon, at the instance of some of the heirs of entail. In the year 1698, young Sir William Scot, with consent of old Sir William, revoked the first tailzie, before it was completed by infeftment, and made a new tailzie, wherein Highchester is brought in before Raeburn, and thereupon Highchester is served heir, and in possession.

William Scot of Raeburn, to whom the estate of Harden would have now fallen by the first tailzie, pursued reduction and improbation of the second, upon this ground, That the first tailzie being perfected by all the solemnities of registration and publication, and containing no reservation to alter or revoke, but, on the contrary, several special reservations of power to provide particular sums, in case of a second marriage, &c. the revocation thereof, and the new tailzie, are entirely void and null; especially considering, that Sir William Scot, younger, stood obliged, in the first tailzie, to resign to himself in life-rent allenarly, where-

No. 121. by he excluded himself from doing any deed in relation to the fee, except in so far as he had reserved power to burden it—*Et exceptio firmat regulum*, &c.

Answered for Highchester, the defender: 1*mo*, The first tailzie, while it remained in the naked terms of a gratuitous obligation, without being perfected by charter and sasine, was no more than a destination of succession, with a view to the hard circumstances that young Sir William Scot and the Earl of Tarras, representative of the family of Highchester, lay under at the time, by the displeasure of the Government; and so was alterable at the maker's pleasure, when his affairs took another turn. And, in a resembling case, of James Muirhead of Breadisholm, the Lords sustained the retiring and cancelling of a disposition, after infeftment taken thereon, though not registered, as being a simple destination of succession, with special views. It doth not import, that young Sir William was obliged to resign to himself only in life-rent. Had the tailzie been completed by infeftment, he could not indeed have altered the same; not as if he had been tied up by the gratuitous destination, but because he would then have been denuded of the fee; and none but a fiar can alter the succession. But, notwithstanding the incomplete bond of tailzie in question, young Sir William remained proprietor, with a power to alter the succession. It is a matter of little moment to object, that Sir William reserved a power to himself to burden the estate, in certain events, and not to alter totally; for that was necessary, upon supposition of his intending to have the tailzie to stand, that the heirs, by their acceptance, might be liable; but it cannot thence be inferred, that Sir William could not totally annul the bond of tailzie, and appoint different heirs, which power belonged to him *ex natura rei*, without any reservation; 2*do*, Old Sir William, the first institute, or rather first in the fee, did concur and consent to the revocation by young Sir William. And though old Sir William could not, by himself, alter the tailzie, having got the right *sub modo*, why might he not, with consent of the granter, who imposed that qualification upon him, renounce such an incomplete deed, whereby the remoter heirs had only *spem successionis?* As, had young Sir William made the right to himself, and, failing heirs-male of his body, to his father, and subjected himself, as well as the other heirs, to all the prohibitory clauses, could not he, while the tailzie continued incomplete, alter the same? No doubt he could; for a person cannot, by such a gratuitous destination, where he lies under no obligation to another, tie himself up from the free exercise of his property; and nemo potest sibi imperare, nec efficere ne leges obtineant locum in suo testamento. As to the act of Parliament 1685, anent tailzies, whereby heirs of tailzie are hindered to sell, annailzie, &c. that respects only heirs of entail, and not the first fiars.

Replied for the pursuer: 1*mo*, A person may divest or oblige himself as firmly by a gratuitous deed (while the question, as in this case, remains betwixt the disponer and obligant, and the person to whom the disposition or obligation is granted) as he may do for onerous causes. Our law makes no distinction betwixt obligations in relation to succession, and those relating to any other subject.

No. 121.

Could a gratuitous bond, bearing no faculty to alter, be revoked, after delivery to the creditor? I suppose not: *Nescit vox missa reverti.* The performance of the voluntary obligation becomes necessary. Our lawyers distinguish betwixt bonds of tailzie and infeftments of tailzie, where the deviser is still fiar; holding that, in the last case, he may freely use his property, where he hath not tied up himself; but can never be free of a bond of tailzie without implementing. It detracts nothing from the strength of the obligation, that no resignation or infeftment followed upon it; seeing the following it out, by resigning and infefting, were deeds concerning, not the granter of the tailzie, but the persons in whose favours the obligations and procuratories were conceived; and it had been in vain for Sir William, who obliged himself, without reserving a faculty to alter, to interpose for stopping resignation or infeftment. If the first tailzie was made, as the defender allegeth, to serve a turn, and protect the estate from any incumbrances that might arise upon young Sir William's facts, this argues a design to have it permanent, and to exclude all power of revocation by him, that the Crown might not, by his being forfeited, succeed to the power of revocation, and destroy the whole project. *2do*, Old Sir William's concurrence could not enable young Sir William to alter, as is clear from what was lately decided betwixt Sir Alexander Don of Newton and James Don, Sect. 7. *h. t.* where irritancies not inserted in the charter of the lands under debate, but only referred to, as in a charter of other lands, were found to affect the institute and first fiar. The pretence, that the act of Parliament respects only heirs of entail, is of no weight; for heirs there are understood all members of the tailzie affected with the limitations and irritancies therein; and not simply such heirs as succeed by service. And albeit a tailzie with respect to superior and vassal may not be counted a real right or right of feu, till once perfected by charter and sasine, yet the tailzie is a simple and real right, by simple production and registration, as to questions betwixt members of it, and rights made in prejudice thereof. *3tio*, The first tailzie was not simply gratuitous, but partly onerous; in so far as, by a clause therein, it is declared, that if Raeburn or any of the other heirs shall break the tailzie of their estates to heirs-male, they shall then forfeit the right of succession to this tailzied estate; which in effect imports a tailzie.

Duplied for the defender: A destination of tailzie, which is always by way of obligation, is not of that irrevocable force with a bond to pay a sum or perform a deed; for, in the one case, the granter transfers a right of exaction to the creditors, whereas, a man, in ordering his succession, is presumed to intend to have it still at his disposal; unless there be an onerous cause for the tailzie, as where there is a mutual tailzie, or where a sum of money is given for the making a tailzie, which fixeth the obligation. In all other cases, Hæredis institutio est ambulatoria usque ad ultimum vitæ spiritum. *2do*, The late decision in Sir Alexander Don's case cannot be applied here; for the tailzie of Rutherford had been completed by charter and sasine, and so the fee upon the estate was qualified. The alteration was made by Rutherford, without the concurrence of old

No. 121. Sir Alexander, the father, from whom the estate was derived, and who imposed the conditions upon his son. Whereas the question is here only concerning a naked bond of tailzie, without infeftment, altered by the maker of the tailzie without consent of the first institute. *3tio*, It is plain that the first tailzie was young Sir William's voluntary free deed, without any payment of money, paction, or mutual tailzie. Sir William's providing, that the heirs of entail should tailzie their estates to the heirs-male, and do no deed to evacuate the same, was not the onerous cause of his tailzie, no not so much as the motive thereof, but only a condition adjected to his own voluntary deed, which qualified it upon the acceptor's part.

The Lords found, That there being no antecedent onerous cause made or done to Sir William Scot, younger, of Harden, for making the former tailzie of his estate, especially in favours of heirs to be begotten and born, and that seeing the said former tailzie did remain in the terms of a personal right, without being perfected by charter and sasine, it is revocable by Sir William, the maker thereof, with consent of Sir William, his father, the first institute, and is actually revoked by them conform to the revocation in process; and therefore assoilzied from the reduction of the second tailzie.

Forbes, p. 685.

1715. *July* 15.

MRS. MARGARET SCHAW, Daughter to the deceased Sir John Schaw of Greenock, and JOHN HOUSTON, younger, of that Ilk, her Husband, for his Interest, *against* SIR JOHN SCHAW of Greenock, her Brother.

No. 122.
Irritancies, and a clause not to alter contained in a contract of marriage, found binding on the maker of a tailzie, although this was insisted for at the instance of a gratuitous institute.

The deceased Sir John Schaw of Greenock, father to the present Sir John, had put his son in fee of the lands and barony of Greenock, by charter and infeftment following thereupon, *in anno* 1686; and, in 1700, in a contract of marriage betwixt this Sir John and his present Lady, both father and son, for their several rights to their said lands, make a tailzie of the estate, in favours of the said Sir John, younger, and the heirs-male of his body; which failing, to his younger brothers *nominatim* then alive *successivè*, and the heirs-male of their bodies; which failing, to the other heirs-male of the said Sir John the father's body; which failing, to the said Mrs. Margaret Schaw *nominatim;* and that under prohibitory and irritant clauses *de non alienando et non contrahendo debitum*, but with this exception, that it should be leisom and lawful to the father and the son jointly to alter the succession.

Sir John's whole younger brothers being deceased, without issue of their bodies, the said Mrs. Margaret Schaw, as standing next in the tailzie, pursued an exhibition of the contract, that it might be recorded in the books of Session for preservation; " and accordingly the Lords ordained the principal contract to be exhibited by their interlocutor on the 25th day of January last, but reserving all