

No. 28. being procured from the Ladies to their bonds, these were made over to his creditors, which was equal as if the money had been given to him.

2dly, John, this pursuer's father, and he himself, have discharged their claim of relief on a transaction: They have not only discharged all claims against the defender, but have homologated the bond of corroboration granted him for these sums, which was an express discharging any claim of relief on the same bonds.

3dly, The act of Parliament fixes this debt on the tailzied estate, and allows lands to be sold for payment of it, which has been done; after which there can be no looking back.

Replied: Although when the heirs of line and tailzie are separate persons, it should be held the heir of line has performed his obligation of relieving the other, by advancing the money, although the heir of tailzie should not apply it; yet, when they are one person, it can never be said he, as heir of line, has relieved himself as heir of tailzie in the tailzied estate, by taking his money and paying debt, which did not affect the tailzied estate.

2dly, The claim of relief is not discharged, for the general clause will not comprehend this claim, as there are others expressly mentioned.

3dly, The act of Parliament finds the debts affect the estate, but says nothing of the relief.

Observed: Though an heir of tailzie has relief from an heir of line, when they are separate persons, it may be doubted if a person tailzieing his estate, expressly with the burden of his debts, and giving a separate estate to the same person, the heir will be bound to disburden the one out of the other: That if the pursuer prevailed, the tailzied estate would not be relieved, for the lands were sold and the debts paid: That the purport of this action was to make the defender account for Sir Thomas Carre's executry, and unentailed subjects, which ought not to be sustained after so long a time, as it could not appear what burdens they were subject to.

The Lords, 4th June, sustained the defences for Mr. George Carre, defender, found no foundation for this action, and assoilzied; and on bill and answers, adhered.

Act. *W. Grant & Lockhart.*
Reporter, *Dunmore.*

Alt. *R. Craigie & Fergusson.*
Clerk, *Justice.*

D. Falconer, v. 2. No. 225. p. 270,

1751. December 20. SCOT of Harden against His HEIRS of TAILZIE.

No. 29.
An heir of tailzie paid debts of the tailzier. His debts after contracted were found

Sir William Scot made a tailzie of his estate of Harden, providing that it should be lawful to the heirs at their accession to the said estate, to sell such parts of certain lands destinated and appointed by him for an adequate price, as should be sufficient for payment of his debts due at his decease, they applying the price of the said lands for payment of his said debts, at the sight of certain persons

named; and failing them by decease, at the sight of the three next immediate heirs of tailzie, who should be Majors at the time; and obliging such of his heirs as had estates of their own, upon their accession to his estate, to tailzie them in the said terms, if they were not already subject to a tailzie inconsistent therewith.

After several intermediate heirs, the estate fell to Scot of Haychesters, who tailzed his own estate in the terms of the former tailzie, granting power to his heirs in the same manner, to sell thereof for payment of his debts, according to a list then made up.

Mr. Scot, during his possession, discharged the interest of the debts he found upon the estate, and part of his own debts, in lieu whereof he contracted some others, and granted bonds of provision to his children; so that, at his death, his debts were found something less than at his accession to the estate of Harden.

Walter Scot of Harden, his son, succeeded him, who pursued a declarator against the heirs of tailzie, that he was entitled to sell these lands specified in the tailzie of Harden, for the tailzier's debts lying thereon at his father's accession, and still; as also to sell his father's lands for his debts left at his death; in which, though appearance was made at first when the action was sustained, the proof led was advised *ex parte*.

The pursuer brought a proof of the debts due upon Harden, at his father's accession; and of the value of the lands allowed to be sold for payment thereof, part whereof it was only proposed should be sold, as they were of greater value: He also brought a proof of the value of his father's estate, and of the debts due thereon, after deducting from them his personal estate; and of the debts due at his death, including childrens' provisions, deducting as above at that time; which came to something less than they were at his accession to the estate of Harden.

At advising, two questions occurred, *first*, Whether Haychesters having, by his tailzie granted liberty to sell, for payment of certain debts, and having discharged these debts, he could by new contractions rear up others to the same extent? Or, whether a possessor of a tailzied estate, paying debts thereon, and not keeping them up by assignation, the estate was not thereby cleared, and remained subject to the tailzie? And, *2dly*, whereas it was said it was impossible to sell land to a precise value, tallying with the debts; and it was proposed to settle the excresce of the price, if any, on land or heritable security, in terms of the tailzie, whether the Lords could find the heir entitled to sell any more than to the amount of the debts?

The Lords found proved the value of the several lands allowed to be sold, and the sum of the debts due upon Harden at Haychester's accession to the estate, and on his own estate at his death: And found that the pursuer had right to sell as much of the lands destined in his tailzie by Sir William Scot, for payment of his debts, as would be sufficient to pay the same; and that he was entitled to sell the lands of Haychesters, &c. for payment of his father's debts, though a part thereof had been contracted since his succession to the estate of Harden; in res-

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- No. 29. spect that the same was less than the sum of the debts due by him at the time aforesaid, after application of his separate estate: And found the pursuer was entitled to apply the price thereof in the first place towards payment of the said debt, and the remainder thereof, whatever it should amount to, to be laid out upon the purchase of lands, or heritable security, in favour of the pursuer and other heirs of tailzie called by Sir William's destination; and under the same provisions, &c. that were contained in the said tailzie, to be conjoined with the tailzied estate, and to remain inseparably therewith in all time coming; providing that the sales should not be at prices under the proved value; and providing that the sales of both estates should be with consent, and the prices applied at the sight of the three next heirs-male, majors for the time,

Act. Ferguson.

Clerk. Murray.

D. Falconer, v. 2. No. 249. p. 306.

- No. 30. 1752. July 1. M^CKENZIE *against* STEWART.

The possessor of an entailed estate, in concurrence with some of the substitutes, obtained an act of Parliament to bring the estate to a sale, for payment of debts of the entailer. The act mentioned these debts specially, and ordained the price to be applied to their payment, and that the overplus should be laid out on land, to be settled on the substitutes, conform to the destination of the entail. The estate was sold, and the payment of the debts mentioned in the act exhausted the whole price. A substitute afterwards brought an action of count and reckoning against the heir of line, insisting, that all the debts in the act did not affect the entail, and ought not to have been paid. The Lords found, That as these debts were specially narrated in the act, they had no power to inquire farther.

Fol. Dic. v. 4. p. 345. Sel. Dec.

* * This judgment was reversed on appeal.—The case is No. 164. p. 7443. *voce* JURISDICTION.

1753. July 13. MAJOR ARTHUR FORBES *against* KATHARINE MAITLAND.

No. 31.
Service of an heir of entail in general, without specifying the entail in the verdict, whether effectual?

Sir Charles Maitland, younger, institute in an entail of the estate of Pittrichie made by his father, expedite a charter of resignation in terms of the tailzie, but died without infestment, and without children. His sister Jean, next heir of entail, expedite a general service, in which the deed of entail was produced before the jury, who gave their verdict finding her next heir of entail to her brother Sir Charles, but omitting to mention in their verdict the deed by which she was made heir of entail. This service was expedite 6th May, 1704; and, upon the 24th of the same month, Jean executed the precept contained in the deed of entail; which