1751, it expired at Candlemas 1770. But, upon the 6th March 1766, Blythswood set another tack of the same lands to Love, but for a higher rent, for nineteen years, from and after Candlemas 1770; but Blythswood having died in November 1767, his heir, in March 1770, raised an action of removing against Love, libelling upon the Act of Sederunt 1756, and concluding that he should remove at Candlemas 1771 from the arable lands, and at Whitsunday 1771 from the houses and grass. And it was pleaded for the heir, that, as the first tack expired at Candlemas 1770, and Blythswood having died before commencement of the second tack, Love therefore fell to be removed in terms of the libel.

"The Sheriff of Lanark, 24th July 1770, found that the defender, in virtue of the last tack, dated 6th March 1766, had right to possess the lands libelled, for nineteen years from the date of the tack; and assoilyied him from the process of removing."

Both parties complained by mutual advocations. The tenant said he had got too little; the master said he had got too much. But the Lords, "on report of Lord Coalston, advocated the cause, and found that the defender, in virtue of the tack dated 6th March 1766, had right to possess the lands libelled, for nineteen years from the date of the tack."

In arguing this cause it seemed to be held for law, That a tack, granted by the proprietor of an entailed estate, is not good against a subsequent heir of entail, unless the tack was clothed with possession in the lifetime of the granter; and that, however it might found the tacksman in an action of damages against the granter and his general representatives, it cannot be set up against a subsequent heir of entail. But then, in the present case, it was said, that Love, in virtue of his second tack, had truly obtained possession. For, as the heir knew of this second tack, it was incumbent upon him to have warned Love to have removed at Candlemas 1770, and not at Candlemas 1771, by which time the first year of the new tack was expired; and his not doing so was a tacit homologation of the tack, and a consent that Love should enter into possession upon it.

But the Lords took a middle course; for, as it was clear that Blythswood and the tenant, by the destroying the old tack, could have entered into a new tack for nineteen years, commencing from Candlemas 1770; therefore they thought that, though the new tack could not be supported as a tack of nineteen years from Candlemas 1770, yet it might be from March 1766. And they pronounced decreet accordingly. And it was said that this was similar to a verbal legacy, which will be sustained for £100 Scots, but for no higher sum.

SIR WILLIAM DENHAM of WESTSHIEL *against* MAITLAND, &c.

SIR William Denham of Westshiel settled the estate on a certain series of heirs by way of strict tailyie, which was duly recorded *anno* 1723.

He was succeeded by Robert Baillie, who, in order to carry the procuratory and precept in the entail, expede a general service, as heir of provision to Sir

William, under the tailyie; but, having omitted to insert the clauses of the entail in his service, a declarator of irritancy on that account was brought before the Court of Session, and decreet given in favours of Mr Archibald Stuart, the next substitute. But, in the year 1774, this judgment was reversed by the House of Peers; and Alexander, the son of Robert Baillie, succeeded. At last, upon his death, Mr Archibald Stewart succeeded a second time; and he dying without issue, the succession opened to William Lockart, the next substitute, who, at that time, resided in England.

The first steps which William took was to insist in a declarator of his right, as heir of tailyie to Sir Archibald in the estate of Westshiel; and having obtained this, he next expede a special service as heir of provision to him under the entail; and, having obtained a precept from the superior, he was infeft. But in this service he omitted to insert all the clauses of the entail.

Having his titles made up in this manner, William took a resolution to sell parts of the estate, and after public advertisements in the newspapers, which, at a public roup, were purchased by Mr Maitland of Belmont and others, as they said, without looking into Sir William Lockart's titles. But upon the looking, and finding things to stand as above-mentioned, they brought a suspension of the sale, which came to be discussed before Lord Kennet, Ordinary, who, December 1775, allowed a proof that Sir William was the last member of tailyie, and that all the others had failed, and afterwards made avizandum to the Court.

Their reason of suspension was evident, *viz.* the fetters of the entail duly recorded in terms of the Act 1685. Sir William's answers were two; *first*, he said, That, being the last member of the tailyie, the fetters thereof could not affect him; for that, failing of him, the estate would devolve upon heirs whatsoever, who were not creditors in the conditions of the tailyie; as was found in the case between *The Earl of Cassillis* and *The Earl of March*, 11 *New Coll.*, 217. And *secondly*, He said, that though this had not been the case, yet the tailyie could, in this case, afford no good ground of suspension; for, having made up his titles without engrossing in them the conditions of the tailyie, onerous purchasers from him were safe, even in terms of the Act 1685.

To the *first* it was answered, That, in point of fact, it was not perfectly clear that Sir William was the last member of the tailyie; but, should this fact be supposed, still the decision in the case of *Cassillis* was a single decision, and the justice of it might be doubted; at any rate there was a distinction between the cases. In the case of *Cassillis*, the Earl, who was the last member of tailyie, was dead, and had died without children. The tailyie therefore was clearly at an end. But, in this case, Sir William is still alive; and though he has no children at present, yet he may have them who will be entitled to take the estate as heirs of tailyie. And, as to the *second*, it was answered,—That the Act 1685 secures *bona fide* purchasers only, which it could not be said that the suspenders were; Sir William's entail being well known to them, and mentioned in his title.

The reply maintained the precedent in the case of *Cassillis*; and that, as to Sir William's having children, the thing was improbable; and even if he had any, they could not quarrel, as he forfeited both for them and for himself. See

15th November 1751, *Creditors of Carleton.* And that it was no argument that a purchaser was not a purchaser *bona fide*, that he knew of an entail, if, at the same time he knew, as in this case, that, by omitting the clauses in the title-deeds, it could not strike against the purchase.

Sir William having died before advising, the cause was not decided.

1777. *March* 11. PETITION of MRS MARY HAMILTON, for Recording the Tailyie of Belhaven.

JAMES, Lord Belhaven, executed a tailyie of his estate of Belhaven, and settled it, failing heirs whatsoever of his body, upon Mrs Mary Hamilton, wife of William Nisbet of Dirleton, and the heirs whatsoever of her body; whom failing, &c.

He excluded husbands of the heirs-female from uplifting the rents, or the administration of the estate, *jure mariti*, and declared that the rents were not affectable by the husbands' debts or deeds, and that the heirs-female of themselves alone should have power, without consent of their husbands, to serve themselves to the estate, to uplift the rents, appoint factors, set tacks, grant charters, provide their husbands in liferents, and their younger children in provisions, to pursue and defend in all actions, and to do every thing relative to said estate, as freely as if their husbands' consent was adhibited.

It contained also a clause appointing it to be recorded in the register of tailyies, and authorising any of the heirs of entail to apply for that purpose.

All these clauses notwithstanding, the Lords refused to record the tailyie, upon a petition in name of Mrs Mary Hamilton alone, without concurrence of her husband. They considered her as still *sub cura* of the husband, and that without him she had no *persona;* at least for recording the tailyie, for which no special power was granted. They thought it competent to authorise her by a tutor *ad litem;* but, this not being sought, they refused the petition.

1761. *November* 27. HALKET and WEDDERBURN *against* HALKET.

SIR Peter Halket held his estate of Pitfirran under two deeds, of which one was a strict entail effectual under the Act 1685: the other was a marriage settlement. On account of the unfortunate situation of his eldest son, who was an idiot from his birth, Sir Peter made a deed passing by him who was his undoubted heir, both by the tailyie and the marriage settlement, and settling his estate on the next heir. But, in a process for reducing this deed, at the instance of the eldest son and his curator, "the Lords found, That Sir Peter had no power so far to alter the tailyie of Pitfirran as to pass by his eldest son Peter, though a natural idiot from his birth, and to settle it upon his second son; therefore they reduced it." But this decree was reversed on an appeal; because it was held that, in this circumstantiated case, the settlement by Sir