

No 3.

free gear thereof amounted to greater sums than would satisfy the foresaid debts, whereto he was assigned by the creditors; and he being executor, and the testament containing more free gear than would satisfy the debts acclaimed, and being confirmed, and he decerned executor before the acquiring of the assignation from the creditors; the said assignation made by them to him, must of necessity be converted for the weil of the defunct's heir, whom in law the executor is obliged to relieve of the defunct's debt, so far as the free gear of the testament extends to; and no other assignation can be made by him to any other assignee, which might prejudice the heir of that relief, which the pursuer's cedent, being executor, was obliged to give him of the defunct's debt, by the defunct's moveables. This allegiance was found relevant against this pursuer, albeit she answered, that she was a singular successor, and that her cedent was answerable, and had found caution in the testament, and the defender might convene him for any thing wherein he was obliged in law, for which this pursuer could not be liable; for he might allege, that the free gear was otherways exhausted, or that after diligence, the gear of the testament was not recoverable, which she could not know, and was not competent to her to allege; notwithstanding whereof the allegiance was found relevant to meet this assignee, as it would have met the executor, who was cedent, and the first assignee constitute as said is.

Act. Baird.

Alt. Lermonth.

Clerk, Gibson.

*Durie, p. 508.*

No 4.

1662. July 10.

KER against KER.

AN apparent heir having purchased in an adjudication of his predecessor's estate, led upon the apparent heir's own bond, brought a process upon that title against some havers, for exhibition of the rights and evidents of the lands, and delivery thereof; the defender *alleged* absolutor, because the adjudication was extinguished *confusione*, which was repelled.

*Fol. Dic. v. 1. p. 195.*

\* \* See The particulars of this case, *voce* COMPETENT, No 8. p. 2701.

1664. December 22.

CALDERWOOD against PRINGLE.

No 5.  
An obligation  
in a tailzie,  
prestable by  
heirs-male, is

THE deceast John Pringle of Cortleferry, by his contract of marriage with Alison Pringie his spouse, in *anno* 1632, obliged him to resign his lands in favours of himself and his spouse, and the heirs to be gotten betwixt them; whilks

failzieing, his own heirs whatsoever. The said John being dead without heirs of the marriage of his body, and his lands, by the old infeftment, being tailzied to the heirs-male, James Pringle of Wilkanlaw has obtained himself infeft therein as nearest heir-male; and John Inglis of Mannorhead, and Marion Pringle, being heirs of line to him, and they having assigned their rights in favours of James Calderwood, he pursues the heirs-male for fulfilling the obligations in the contract in favours of the heirs of line. It was *alleged*, The obligations being made by the defunct, and the pursuit being at the instance of the heirs of line their assignee, and to their own behoof, *debitum* and *creditum* is confounded; and though it were not confounded, but that the heirs-male might be thought liable to the heirs of line, yet not in this case; because the old tailzie of the lands was constituted by infeftment granted by the superior, which cannot be taken away by any such naked obligation, unless infeftment had followed thereupon from the superior; because infeftments of tailzie, as they are constitute, must that same way be dissolved by an infeftment from the superior. Likeas, to clear that it was not the defunct's mind to alter the tailzie, that he did live many years after the contract, and did nothing thereupon in favours of his heirs of line, and which contract was made for the use of the wife in liferent, and the heirs of the marriage; and whereas, heirs whatsoever were substitute, failing heirs of the marriage, his meaning has clearly been of heirs whatsoever contained in his old infeftment, which were heirs-male whatsoever. Likeas, it was *alleged*, That, by the old infeftment granted by the superior, it was provided, that the tailzie should not be altered without consent of the superior. It was *answered*, That where an obligation is only performed by an heir-male, especially in favours of the heir of line, there can be no confusion, the heir-male being proper debtor, and the heir of line creditor. And the question is not here, how a tailzie should be perfectly constitute or dissolved, which no doubt must be by infeftment from the superior; but here the question is upon an obligation for perfecting a tailzie, viz. for resigning in the superior's hands; which obligation the defunct's heir-male is obliged to perform to the pursuer, who will take his own way with the superior; and though there were such a clause in the old infeftment, that the tailzie should not be altered without the superior's consent, which is denied, yet that takes not away the force of the obligation against the heir-male; but that he ought to resign in favours of the pursuer, who will take his hazard of the superior, in whose favours that condition is conceived.

THE LORDS, before answer, ordained the old charter of tailzie to be produced, that they may consider how it was conceived, which they did, conceiving the case to be favourable for the heir-male, in respect nothing had followed upon the contract in the defunct's time; and yet their judgment was, that the obligation could not be made void, but behoved to be fulfilled, unless something more did appear from the old tailzie.

No 5.

not extinguished *confusions*, altho' the benefit may eventually accrue to heirs of line.