No. 23. The Lords found, That, by the tenor of the clause, and narrative thereof, the defunct's meaning was chiefly to oblige his heirs-male, and albeit successors whatsomever were added, yet, by the narrative and order of the words, they found the heir-male was first burdened, and behoved first to be discussed; therefore ordained the defender to condescend what the heir-male had to succeed to; and if he was not entered heir-male, and had nothing to succeed to as heir-male, they thought the defender would be liable.

Stair, v. 1. *p.* 132.

1670. *January* 5. INNES *against* INNES.

No. 24.

A father assigned an heritable bond of 6000 merks to his children, 4000 merks to Robert, and 2000 merks to William and Janet; and, in case of Robert's decease, providing his part amongst the rest equally. Janet having died before Robert, and Robert having also died without children, William, as heir to Robert, claimed the defunct's share, upon this ground, that Janet being substituted to Robert, without mention of her heirs, and having died before him, she never had right, and her substitution became void, and her heirs not being called in the substitution, since they could not have right, but as coming in Janet's place, the substitution was also void as to them. On the other hand, it was argued for Janet's heirs, That Janet being the last person called in the substitution, the same place that she herself would have taken up, if alive, must her heirs take up, now that she is dead: Janet was called preferrably to Robert's heirs, and would have excluded them, so must her heirs, since it is not pretended that any person is interjected betwixt them. The Lords preferred the heirs of Janet, and found, That they had right as heirs of provision to Robert, and that they ought to be served to him, and not to Janet, who never had right herself, having died before she was or could be heir to Robert.

Fol. Dic. v. 2. *p.* 400. *Stair. Gosford.*

*** This case is No. 60. p. 4272. *voce* FIAR.

1677. *February* 22. BRUCE *against* MELVILLE.

No. 25.
No member of a tailzie can be served heir while there is a hope of a nearer.

The late Earl of Leven being infeft, as heir to his father, in the estate of Leven, which was then provided to heirs whatsomever, by a bond of tailzie, resigned the said estate and dignity in favours of himself and his heirs of tailzie, and thereupon was infeft. The tenor of the bond of tailzie is as follows: "For the weal and standing of his house, honour, and dignity, in his own posterity; which failing, of the persons of his heirs of tailzie after specified, viz. the heirs-male of his body; which failing, the eldest heir-female procreated or to be procreated

of his or his said heirs-male, without division, the said heirs-female *successivè* succeeding in all time coming, marrying a nobleman or gentleman of the name of Leslie, or who would assume that name, and using the dignity of Leven; which failing, the second son of John Earl of Rothes, lawfully procreated, or to be procreated of his body, and the heirs-male of the said second son's body; which failing, the second son procreated or to be procreated betwixt George Lord Melville and Dame Catharine Leslie, his spouse, sister to the said Earl of Leven, and the heirs-male of his body, the second son so succeeding, and their foresaids, assuming and bearing the surname of Leslie, and arms of Leven, with this provision, that if any of the said persons, or heirs-male of their body, shall, after their succession, succeed also to the Earl of Rothes or Lord Melville, in that case the said dignity and estate shall *ipso facto* pertain to the next heir of tailzie, in whose favours the person so succeeding shall be holden to denude himself; which failing, to the second son procreated, or to be procreated, betwixt David Earl of Weems and Margaret Leslie, Countess of Weems, his spouse, mother to the Earl of Leven, with the like condition, (in case he fell to be Earl of Weems); which failing, his heirs-male whatsoever; which all failing, his heirs and assignees." There is subjoined a clause irritant, " that in case of failzie of the performance of these provisions before-mentioned, or any of them, the dignity and estate should pertain to the next person and heir of tailzie, secluding the failziers and the heirs of their body, who shall be held to denude themselves in favours of the next heir of tailzie." It is also declared, " that it shall be leisome to the said Earl, in his own time, to alter the said tailzie as he pleases." Shortly after the infeftment of tailzie, the Earl of Leven died young, and left three or four daughters, who all died without issue, and un-infeft; whereupon brieves were raised for serving David Melville, second son to the Lord Melville, as heir of tailzie to the Earl of Leven, in respect the Earl of Rothes, then Chancellor, had no sons. There was also a gift of non-entry passed in Exchequer, in the name of Sir William Bruce, to the behoof of the Chancellor; where the Lord Melville competed, and declined the Chancellor, and alleged, that the commission to the Treasury and Exchequer requiring three Commissioners of Treasury as a *quorum*, and there being but two beside the Chancellor, he could not be judge of the preference, where himself was a party, nor make up the *quorum*, by signing in favours of himself; and offered to take the gift with the burden of all the debt. Yet Sir William Bruce offering to take the burden of the current annual-rents, he was preferred, and his gift passed with that burden. Before this gift was passed, the King wrote a letter to the Lords of Exchequer, " that no gift should pass till his pleasure should be known;" but ere the letter came, the gift was passed; whereupon the King granted a new gift to Lord Melville, narrating the precipitation of the former gift, and the King's letter; which was also passed in Exchequer. There was likewise an advocation of the brieves for serving David Melville heir to the Earl of Leven, raised at the instance of Sir William Bruce, as donatar, whose gift included the profits of the earldom of Leven, until a next lawful heir, and wherein there was inserted,

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No. 25. during the time of the dispute, a clause, for declaring, " that so long as there was hope or possibility of a second son of the Chancellor's body, no heir of tailzie could be served to the Earl of Leven." The advocation having come in by the course of the roll, was advocated, of consent, and the raisers of the advocation craved, that it might be remitted, with assessors named by the Lords, that being the only effect of an advocation of brieves; for, by the law of this kingdom, brieves can only be served by a Judge-Ordinary, or delegated, with an Inquest; and the Lords cannot serve either *affirmativè*, that David Melville is heir, or *negativè*, that he is not heir; for, in most advocations, the Lords pass letters of advocation, to advocate from inferior Judges to themselves, as competent Judges in the principal cause, in the first and second instance; but, in other cases, they advocate from the inferior Judge, as not being competent, or as being suspected, through relation to the one, or enmity to the other party, or as malversant, by having committed injustice in the cause, and yet do not advocate the cause to themselves, but do remit it to the competent Judge; as if the confirmation of a testament were advocated from a Commissary, in whose jurisdiction the defunct had not his principal domicile, the Lords would advocate the cause, but not to themselves, because they cannot confirm a testament, but would remit it to the competent Commissary; or if a Sheriff were proceeding in a cause criminal, the Lords, upon his incompetency, as not in capacity to judge in causes peculiar to the Justice-General, as the pleas of the Crown, or upon his relation or emnity, yet they would advocate only *ad hunc effectum* to remit it to the Justices, who have not power of advocation; but the Lords of Council and Session, as they are his Majesty's Council, though not his Secret Council, albeit they cannot judge causes criminal in the first and second instance, yet they are Judges to advocations or remits thereof; so, in this case, they can only advocate the brieves *ad effectum* to remit them, with or without assessors. It was answered for the donatar, That the Lords ought not to remit the brieves, but to stop the same, and declare, that, during the possibility of a second son of the Chancellor's body, there could be no heir of tailzie served to the Earl of Leven. It was replied, That there was no foundation in the advocation whereupon the Lords could declare, seeing it contained no declaratory conclusion. It was duplied for the donatar, That there was now in his summons of declarator a special conclusion, " that no heir could be served to the Earl of Leven so long as a second son of the Earl of Rothes was in possibility." This point was debated, after the dispute in point of right; and the Lords declared, " That they would first determine in the declarator at the donatar's instance, and would consider all the dispute in relation thereto, seeing there is no declaratory conclusion in the advocation." The dispute of the point of right was very large; in which it was alleged for David Melville, as to the conclusion in the donatar's declarator, 1*mo*, That the donatar had no title whereupon to declare the right of the Chancellor's second son, neither any further than the ordinary stile of a declarator of non-entry; for it was never sustained, that donatars should quarrel the right of any party, to the effect that their gift might

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take place; otherwise, they may open all men's charter-chests upon pretences of nullities, that being a special branch of gifts of non-entry, by reason of nullity of infeftments; and yet that was never allowed, and would be of dangerous consequence; neither was a donatar ever admitted to stop the entry of an heir, though he hath a consequential interest. *2do*, The possibility of the existence of any person, by the law of this kingdom, neither did nor could stop the entry of the nearest existing heir, when the heritage is devolved, which is in controversy, and always practised in many cases; as if a son die infeft in lands, without children, and without brethren and sisters, his father will be served heir to his son, albeit there be a nearer heir in expectation, viz. a brother or sister of the defunct; and yet though the father had a wife bearing children, and they in the nearest degree of expectation, the father's service to his son would not be stopped an hour; which, if it had not been an incontroverted rule in law, there would never have been a donatar wanting to stop the entry of the father, so long as he might have children, which might have been so long as he lived. If this imagination had ever been thought worthy of the Lords' answer, would not a donatar have taken the gift of the non-entry of the whole estate of Roxburgh, which was provided to the Lord Ker and his heirs-male, and whereby the rents of one of the most opulent estates of Scotland would have been enjoyed for ten years space, that the old Earl lived after his son, to whom the father was immediately served? or if a son died, leaving a sister, or leaving a half-brother, yet these would be his heirs, albeit the father were alive, who would endeavour to preserve the succession of his son to a brother-german, whom he might get thereafter; and though these cases fall frequently out, yet, till now, there was neither a project nor a pretence for a donatar; and if this declarator should take place, multitudes of inconsistencies and absurdities would necessarily follow; as, first, that *dominia rerum sunt incerta et in pendente*, that there might be *dominium sine domino;* for the right of the fee of the Earl of Leven's estate is a right of property, and therefore must belong to some proprietor, and cannot belong to nobody; but if the Chancellor's second son have right, he is nobody, and not *in rerum natura;* for though law esteems *partum in utero pro jam nato*, yea, and presumes the same to be *male*, yet no fiction or presumption of law was ever stretched to give existence to a mere possibility, whereof there is little hope. *2do*, If this shall take place, there is a compendious way laid to elide and destroy all creditors, for the donatar claims right to the whole profits during the possibility, so that, during that time, creditors can neither have stock nor brock; yea, devices of this sort might exclude them for ever; as if a tailzie were framed to the second sons of so many families, and, by the same rule, to the fifth son; or, which is very ordinary, if a fiar, having many sisters or daughters, should tailzie his estate to the heirs-male of his body, which failing, to the heirs-male of the bodies of all his sisters or daughters, in order, and knowing it were easy to get such a gift, and so enjoy the estate, without payment of his debt, where the debt would become too heavy for the estate, for in that case the possibility might endure for 100 years; so, in this very case, the second sons

No. 25. of three families are called, and, amongst them all, there is but one extant, and if he were not, or should die without children, during the vacancy, the same would continue during the lives of the Earl of Rothes, the Lord Melville, and the Earl of Weems; neither could creditors affect the very property; for law having introduced the way of affecting estates for defuncts' debts, when the successor enters not, by charging them to enter heir, with certification, that like process should be had *contra hæreditatem jacentem*, as if they were actually entered; but, in this case, there is no person that could be charged, and so neither decreet nor adjudication obtained, for a possibility could not be charged. *3tio*, Vassals could not be entered. *4to*, All the rights and interests of the family of Leven *activè* behoved to be neglected; for there could neither be process for recovering their debts, nor shunning irritancies or prescriptions, for a donatar would have no interest; nor could there be process at the instance of a *non-ens* in possibility; so that the whole scheme of our law, stile, and custom, should at one blow be overturned, and all the tailzies in Scotland, which reach the greatest part of it, should lose their intent, which are made to secure their families in their posterity and their relations; for such a gap as this, which might oftimes occur, would ruin their estates, and overturn their design, and that without possibility of remeid, because most of these tailzies are with clauses *de non alienando*, excluding any alteration. *5to*, Tailzies do come in place of successions by testament; for the nature of feudal rights, admitting of no alienation or alteration of heirs, without consent of the superior, and the law of this kingdom, annulling all deeds on death-bed in prejudice of heirs, do exclude all successions in feudal rights by testament; in place whereof tailzies and provisions do succeed, and have the like interpretation in extension, not only from the express, but from the presumed and conjectured will of the defunct, which is the rule in all dubious cases, not only by the Roman law, but by the custom of all nations, who, though they do interpret clauses dubious in contracts *contra proferentem*, yet, in the dispositive wills of defuncts concerning their succession, they are always favourably interpreted and extended, it being the common interest of mankind, that the wills and minds of defuncts should be effectual; and therefore the interpretation in latter-wills, in dubio pro disposito habetur, de quo, veresimiliter defunctus si interrogatus fuisset, respondisset. Now, it is beyond all doubt, that if the Earl of Leven had been interrogated concerning this case now in controversy, viz. " Whether it was his mind, that if, at the time of the failing of his own issue, the Chancellor should not have a second son existing, whether he would have the next heir of tailzie entering, till his existence, or that he would have his dignity sopited, and the profits of his estate fall to the King, his debts running on, and his interests unpursued?" that he would have answered, " That while the heirs of the first member were not existing, the heirs of the next member should enter;" for the reason and motive assigned by him in the bond of tailzie is, " for preserving his dignity and estate."

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It was answered for the donatar, That he had good interest to hinder the entry of an heir, wherein he was founded in the King's right as superior, who might well exclude any pretending to be vassal, who had not the just right; and as to that defence *in causa*, that the succession of heirs by the course of law, is not stopped by the possibility of a nearer heir, yet that takes no place in heirs of tailzie; for albeit by the ancient Roman law, the entry of an heir was *actus legitimus nec recipiens diem nec conditionem*, and that none could be heir, who was not existent in the family of the defunct, whereby posthumous children were excluded, till by the more recent law they were admitted; as likewise those who were emancipated were admitted as heirs, or *bonorum possessores*, yet the matter of succession was exceedingly altered *per jus novissimum*; and all nations, even who own the Roman law, have now returned from the subtilties thereof, unto the common rules of reason, as Vinnius upon the Institutes on the matter of Succession declareth; so that an heir may be made for a time, or on what conditions or terms the defunct pleases; and there is nothing more the common concern of mankind, than that they should have full power to dispose of their own, so as to take effect in their life or after their death; and therefore we are to consider the will of the defunct in this tailzie, which appears by these specialities, *first*, the substitution of the Lord Melville's second son is conditional, failing the Earl of Rothes' second son, which condition must either be suspensive or resolutive; but the defender will acknowledge neither, but pleads that the non-existency of the heir of the prior member of the tailzie at the defunct's death, excludes him and his for ever; and so, if my Lord Melville had not now a second son, the whole tailzie and design of the Earl of Leven were evacuated, and the estate would return to the Earl's heirs whatsoever, in the same condition it was before the tailzie. *Secondly*, When this tailzie was made, the Lord Melville's second son was born, and the Chancellor's second son was in no more probability than now he is, so that it would have been an empty compliment to have inserted him in the tailzie, unless it had been intended to wait for his existence; and it is the opinion of Peregrinus, that where an heritage is provided *hæredibus nascituris*, it should stop so long as they can be born, as appears p. 309. and 310. which states the very case now in question; and for that maxim *dominium non potest esse in pendente*, it hath many fallacies, though ordinarily it doth hold; and the exceptions are most in successions; for instance, if lands or sums be provided to two persons in conjunct fee, and the longest liver in fee, it is uncertain and dependent which of the two is fiar, till death determine it; or if an estate were settled in these terms, to the heirs-male of the disponer's body, which failing to any of the disponer's brother-sons who should marry the disponer's daughter, or to any of them whom the disponer's brother should find most deserving, in this case the disponer dying without heirs of his body, the succession were uncertain and pendent, and yet no man could quarrel the same as not being a rational and valid establishment; and though in this case the estate of Leven be under burden, and no great probability of the existence of the Chancellor's second son, yet the defence behoved to infer, that though the Chancellor had a Lady bearing children

No. 25. every year, unless a second son were begotten before the Earl of Leven's issue were extinct, David Melville, as heir of a subsequent member of the tailzie, would enter and exclude the Chancellor's second son, and all his successors for ever; yea though the clause of the tailzie did bear expressly, that so long as there were hope of the heirs of a prior member of the tailzie, the heirs of the subsequent members should not have place, and the arguments adduced for the defenders, would control the express will of the defunct, because there would be *dominium sine domino*, yet it were a most unjust restriction to hinder a proprietor to dispose of his own, for which there is neither law nor custom; but, on the contrary, the judgment of the Lords of Session appeareth in the like case, though it was by arbitriment; for the Laird of Blackwood having no children but a bastard-daughter, did in her contract of marriage with Major Bannatine, dispone his estate to the Major and the heirs to be procreated between him and Marion Weir, which failing, to the heirs to be procreated by Marion Weir with another lawful husband, which failing, to the Major's heirs whatsoever: The Major died, leaving only one daughter, who died uninfeft; shortly after, her father Corhouse obtained himself infeft as heir, and thereby heir of tailzie to Blackwood; Marion Weir being married to William Lowrie, and having by him a son, there was a reduction intented before the Lords of Corhouse's infeftment and service, upon the same ground, that while Marion Weir's heir was in hope, the Major's heir could have no place; and the matter being judicially referred to the Lords' arbitriment, they decerned Corhouse to denude himself in favours of Marion Weir's son, who now enjoys the estate; whereby it is evident that they preferred the heir who was in hope the time of the defunct's death; and as to the inconveniencies adduced on the other other part, *first*, there are greater inconveniencies on the contrary, viz. the perverting of the order of succession, designed by the defunct in excluding those for ever, who he most favoured; *2do*, Though the other inconveniencies were greater, *incommodum non solvit argumentum*: and yet all these inconveniencies may be cured, for when an heir cannot be entered, all the rights of the defunct remain *in hæreditate jacente*, and the Lords may use the remeid ordinary amongst the Romans, *curatorem bonis dando*; neither will the creditor's hazard be so great, for the King, as in other cases, so in these successions, will give gifts with the burden of creditors, as in this case the Exchequer hath burdened the donatar with the current annual-rents of the creditors, and creditors may adjudge so as they do against donatars of bastardy, or *ultimus hæres*. It was replied for David Melville, That the defences against this declarator are noways elided or satisfied by the answers, for if it be sufficient for the donatar to found on the King's interest, he may reduce all infeftments, that non-entry may take place, which none can do but the King's officers by special warrant; neither is the defence from legal succession elided by the donatar's sole assertion, that tailzied succession proceeds not in the way of legal succession; for it is true they differ in the persons who succeed, but there is neither reason, law, nor custom, adduced for their differing in serving the heir existent at the time of the fiar's death, and suspending the same upon possibility or hope of a nearer heir;

for as to that point, there is no shadow of difference betwixt the two successions, and if any were, the stop should rather be for the heirs of line in the legal succession, who are always of the nearest blood to the defunct, whereas the members of tailzie do ever break the line of nearest of blood, and are oftentimes very remote, and sometimes have no relation at all by agnation; as in this case the Chancellor being the defunct's mother-brother, is but a cognate, and has no interest in blood to the family of Leven, nor any of his sons; but though the defunct had expressly declared, that no posterior heir of tailzie should be served while there were hope of the Chancellor's second son, that would indeed take off all arguments of the presumed or conjectured will of the defunct, and yet it is no absurdity, that it should not be effectual, as not done *habili modo*, and to the hurt of creditors and vassals, and inconsistent with the nature of property, and no more effectual than if the defunct would have provided his heirs of tailzie to succeed to him, without burden of his debt, or without testament, both which would be ineffectual, as all other things established as *jura publica*, for common utility, and not for the particular interest of a party, which, though he might renounce or alter, as introduced in his favours, yet not the other, for pactis privatorum non derogatur jure communi; but what pretence can there be to stop a service in this case, where no such thing is expressed by the defunct; but on the contrary, his conjectured will must be elicited from his design to continue his dignity and estate, and so not to interrupt his dignity for many years, and ruin his estate for ever; for the conjectured will is ever taken from reason and interest, and nothing can be presumed which is against the same, and none but a madman can be thought to have had such a mind, by putting the Chancellor's second son in his tailzie, to bury his memory for many years in a simple possibility; and the conjectures on the contrary are empty mistakes, for when this tailzie was made, the Earl was a young man, having three or four daughters, and a Lady bearing children every year, and little was dreamed of this event, that his heirs of tailzie would immediately succeed to himself; but that if his issue should happen after a long time to cease, then the Chancellor's second son, or the heirs-male of his body, should succeed; and according to what was the most ordinary and probable expectation, the Chancellor would have been dead before the Earl his nephew, and all their offspring, so that there was no thoughts of any uncertainty or hope, for then the second son behoved to have been existent, or the heirs-male of his body, and not to be possible after the Chancellor's death: Neither is the case here of the institution of heirs, which were *nascituri*, as in Peregrinus' case, whose authority is of small moment, and who in that place adduces the contrary opinions of most famous lawyers; but here the conception being of heirs-procreated, or to be procreated, is by the common style, and hath no special expression, but are redundant words of style, which though left out, would make no alteration, far less can import the defunct's will so contrary to his interest. And whereas, it is pretended that the substitution of the second son of the Lord Melville, is conditional, failing the Chancellor's second son, this is a mere mistake; for the words, "which failing," imports only the order of

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No. 25. succession, and is no more than if it had been thus expressed, The heirs of the disponer's body, and after them the Chancellor's second son and his heirs-male, and after them the Lord Melville's second son, &c. For, though in a disposition or institution, that clause "in case of failing, or failing heirs of my body, I dispone to such persons," this were truly a condition, because there was no substitution in succession, but a conditional provision; but where there is a substitution, which failing, it imports no condition, either suspensive or resolutive; and albeit both such conditions may be in infeftments, or dispositions of lands, as in infeftments of relief, or warrandice, which always express or imply a condition of distress, and so suspend the effect of the infeftment, till the purification of the condition by distress, or the same do resolve by relief; yet the infeftment is a valid right, and hath a certain proprietor, and is not *dominium sine domino*, and cannot be drawn in example, to make property once constituted to have a *hiatus*, and become *nullius*, and without any new deed revive again, as is now pleaded; neither doth the instances adduced infer the same, for it is not debated, but succession may be doubtful and dependent before the defunct's death, for then the proprietor living is *dominus*, and the conjunct fiars are the *conjunct-domini;* but that *post dilatam hæreditatem*, there should be no heir that could enter, and so *dominium sine domino*, is impossible and inconsistent; for, in the instance adduced of a brother's-son, substitute to the disponer's heir-male, who should marry the disponer's daughter, or whom his brother should choose, that would never be the last termination, but which failing, the disponer's heirs whatsoever, who might immediately after the defunct's death, enter, or compel the brother's son to enter, either by marrying the daughter, or by being designed; and it would be a gross absurdity to pretend that they might delay during their life, though the hope were much nearer, it being always in their power every hour, and not like the procreation of a second son; but it cannot be imagined, that the Earl of Leven intended the Chancellor's second son to have the benefit of his estate, before he was gotten or born, and to have clogged his other heirs of tailzie with a suspensive condition; neither yet that he intended a resolutive condition, for it was easy and obvious, that he did expressly provide, that as in case the Earl of Rothes' second son should succeed to the estate of Rothes, that he should denude in favours of the next person heir of tailzie; so he would have provided, That if through the non-existence of the Chancellor's second son, the Lord Melville's second son should succeed, that upon his superveniency the Lord Melville's second son should denude in his favours, and so the succession be *fidei commissaria;* but seeing the like accident is thought on and expressly provided for, and that is not provided for, it can never be thought the conjectured will of the defunct. And as to the salvos to the inconveniencies, they are without warrant or example; for there was never in Scotland a *curator bonis*, neither can the consequence from adjudications against donatars of last heir and bastardy take place here, for in both these cases the King succeeds as heir; and though the law allows him only of all heirs not to be liable personally for the defunct's debt, but *quoad vires hæreditatis* by adjudication, yet in this case the King is pretended to

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have right only to the profits during the non-entry or vacancy, and that without the burden of any debt, so these could neither be adjudged or any way affected: And as to the property, the King hath no interest, and therefore nobody could be called for obtaining decreets or adjudications of the property, during the vacancy and the non-existency of the expected heir. And as to the instance of the case of Blackwood, it is evidently contrary to the donatar; for, in that case, Corhouse the heir existent raised brieves, which were advocated to the Lords, as in this case, and after debate were remitted to the Judge-Ordinary, and assessors named; but the Lords were far from declaring, that during the possibility of Marion Weir's heirs, there could be no serving of Bannatine's heirs, and therefore Corhouse was served and infeft. It is true, when Marion Weir's son came to be existent, and a reduction or declarator at his instance, the Lords did not proceed as Judges, which they would frankly have done, if there had been ground for this pretence, to exclude the heir existent, upon the possibility of a nearer; but though the nearer heir came to exist, they were not clear to reduce, but as in other cases, where the law is difficult, and there may be equitable considerations thereto, the Lords did require a judicial submission to them, not as Judges, but as arbiters; upon which account, and not by law, they decerned Corhouse to denude in favours of Marion Weir's son, upon payment of £.20,000.

In this debate, it being proposed, *quid juris*, if Melville's second son should be entered, and after his death, there should be existent a second son of the Chancellor, and likewise a second son of the Earl of Weems, and no heir of David Melville's body, Whether would the Chancellor's second son have right as heir of tailzie, by a branch prior to Melville's son, or Weems' son, though of a branch posterior? But Melville's advocates did only answer, that *semel exclusus semper exclusus*, and the Chancellor's advocates answered nothing. But this coming to be reasoned amongst the Lords, all did agree, that the rule in this case was the presumed and conjectured will of the defunct, and many were of opinion, that the non-existence of an heir of tailzie of a prior branch could not stop the entry of an existent heir of a posterior branch, during the non-existence of the first branch; and that the defunct could never be thought to stop his dignity for a considerable time, and hazard his estate upon expectation, and therefore, that the nearest heir at his death should enter; but if after his death, the heir of the prior branch were then existing, he should not be excluded, but should succeed as heir of tailzie to David Melville, and not only be preferred to the Earl of Weems' son, but to the heirs of David Melville's body, who were not called or respected as David Melville's heirs, neither needed they to be served heirs of line to him, but might renounce to be his heir of line, and yet enter as his heirs of tailzie, and therefore were no more respected than if they had been existent the time of the tailzie, and named, and no more than the second son of the Earl of Weems; but as the heirs of Marion Weir were called in Blackwood's tailzie, who neither needed, nor could be her heirs, seeing they might enter when she was alive, and therefore were only heirs demonstrative, so David Melville's heirs were the same way called in this tail-

No. 25. zie; and it was proposed, that as in England, where such tailzies are frequent, the fiar of one branch, after the possibility of issue is extinct, becomes as liferenter, and is incapacitated to burden the estate, not by any statute, but by custom from the nature of tailzies, which otherwise would be evacuated, the branches having little or no relation to one another; and therefore, when there was no hope to continue the succession in one branch, the present fiar would certainly overburden, which was restrained as inconsistent with the nature and design of the tailzie, which also upon the same grounds might so be declared here, tailzies becoming now frequent with us; yet the plurality found, that during the possibility of a second son of the Chancellor's body, no subsequent heir of tailzie could be entered; but thereafter, a bill being given in for David Melville, proponing a second defence, viz. that though he could not enter, yet the profits could not fall to the King by non-entry, which never takes place, but when it is voluntary, or, as being caduciary, but that the profits would remain *hæreditate jacente*, and might be managed for the advantage of the estate, and for the benefit of all the heirs of tailzie possible, and existent, till their actual entry; this being the penult day of the Session, the Lords would not enter the parties to a new dispute, but, according to their ordinary course in general declarators of non-entry, they declared, reserving this defence to be proponed in the special declarator, or any action for the profits of the estate.

Fol. Dic. v. 2. *p.* 399. *Stair, v.* 2. *p.* 510.

*** Gosford reports this case:

In a reduction of a brieve for serving David Melville heir of tailzie and provision to the deceased Countess of Leven, upon this reason, that, by the bond of tailzie, dated the 12th of February, 1663, which is the ground of raising these brieves out of the Chancellory, the deceased Earl of Leven did oblige himself, and his heirs, to make a due and lawful resignation of his honour, title, dignity, and whole estate and lands, in favour of himself and the heirs male of his body, which failing, to the eldest heir female to be procreated of his body, or of the heirs male, they marrying a nobleman or gentleman of the surname of Lesly, or one who should assume the said sirname, and bear the arms of the house of Leven; which failing, to the second son of John Earl of Rothes, lawfully procreated or to be procreated of his body, and his heirs male; which failing, to the second son procreated, or to be procreated, betwixt the Lord Melville and Dame Catharine Lesly his spouse, and the heirs male of the said second son's body; which failing, to the second sons procreated, or to be procreated, betwixt the Earl of Wemyss and Dame Margaret Lesly, his spouse, and the heirs male of his body; upon which bond of tailzie resignation being made in the Earl of Leven's own life-time, after his decease it was perfected by infeftment; and now, by the death of the said Earl of Leven's three daughters who survived him, the succession falling to the heir of tailzie, David Melville can never be served heir, because the tailzie is conceived in

favour of the second son of the Earl of Rothes, now Lord Chancellor, and David Melville is only substitute failing of him by decease; but so is it, that albeit my Lord Chancellor hath not yet a second son, as he had none the time of the tailzie, yet so long as there is a possibility of his having a second, the said David can never be served heir of tailzie and provision to the said estate; and so Sir William Bruce, being donatar to the non-entry of the estate, hath good reason to hinder that service, and debar David Melville's succession during the Chancellor's life-time, and his hopes of having a second son. No. 25.

It was answered for David Melville to the reason of advocation, that it was no-wise relevant to hinder his service, because it being founded upon these words, "which failzieing," or "*quibus deficientibus*," they can only have respect to *tempus delatæ hæreditatis*, so that the Lord Chancellor not having a second son at the time of the death of the Earl of Leven, who did make the tailzie, nor the time of the death of his heirs female, who have since died without children, the whole benefit of the tailzie did fall and belong to the said David, as second son of Lord Melville, whose service cannot be stopped upon any hopes that the Earl of Rothes may have a second son; which answer was urged upon these reasons, *first*, That all clauses of tailzies and contracts which are of themselves dubious ought to be interpreted according to the clear meaning and intention of the makers, and as they can best consist with his design; but so it is, that this tailzie being expressly made for the good and standing of the house and family of Leven, which was lately erected, and upon which account, failing of heirs of the Earl's own body, several persons were substituted as heirs of line, it cannot be imagined, in reason, but all their substitutions should take place *tempore devolutæ hæreditatis*, and so the Lord Chancellor, having no second son extant when the last Countess of Leven died, David Melville, by all the interpretation of law, can be the only heir of tailzie; and if this were not sustained, then many great inconveniencies would follow, which undoubtedly might ruin all tailzied estates, prejudge their creditors, and likewise their superiors, who could have no vassal during the hopes and probability of an apparent heir; and for clearing of the particulars they did represent, that if the heir of a tailzied estate should die in debt and burden, for which no infeftment was given, nor confirmed by the superior, then the whole rents would belong to the superior or his donatar, until the entry of an apparent heir, which being uncertain, might not fall out in thirty or forty years, and the annual rents never being satisfied, might amount to the value of the estate, especially if affected with any conjunct fees or life-rents, as in this case; and farther, if there were any debts due to the heirs, or actions competent to them, then there being no existent heir, they could never have the benefit thereof for the standing of the family; and it might so fall out, that all the rights might prescribe in law through the non-existence of an apparent heir;—as likewise, the superior himself might be prejudged, and the King's interest, not only for the want of vassal, but for the benefit of fore-faultrie single or life-rent escheat. This point was likewise urged from the current style of all writers of tailzie, who did never make any special provision, or

No. 25. adject the same to these words *quibus deficientibus*, that in case the first heir nominated in the tailzie were not existing *tempore devolutæ hæreditatis*, that then the next heir nominated being existing, he should succeed, which hazard could not but occur to them, seeing they could not but imagine that the heritors of ancient families, who did employ them, ordinarily had only daughters of their own body, and so did provide the succession to their estates to their nearest agnates, or second brothers and their heirs male, and if they had greater fortunes, to their second sons, with the burden of their own daughter's portions, and so if it should fall out, that the first heir-male nominated in the tailzie, being a second son, should not be living the time that the heritage should ascend, but the same should be in non-entry during the hopes of a second son, then his own daughters would lie out of their provisions, and could not so much as have aliment during that time, there being no person whom they could pursue.

The second point of law insisted upon, which was the subject of great debate, was, that the existing apparent heir, nominated in the tailzie, must of necessity succeed, and his service ought not to be stopped upon hopes of apparent heirs of one first nominated, because it was an undoubted principle in our law that *Hæreditas et dominium non potest esse in pendente*, and therefore the succession must be devolved to the actual existing heir for the time, and as this was undoubtedly the *25th* Para. Institut. *De legatis*, and many lawyers who had commented upon the Roman law, such as Peregrinus and others, were of that opinion, that where any estate was left *nascituro*, unless there was a *posthumus*, and an appearance that a child might be born, that legacy was caduceary, and fell to the next apparent; which was likewise the opinion of Craigie; and our law makes no difference betwixt legal successions and tailzied; but as it is undoubted *in successione feudali* that there being an apparent heir living, he must of necessity succeed, and cannot be debarred upon the hopes that one would be born who would be nearer heir, and could exclude him, as in the case of a father having but one son, he will undoubtedly succeed to him, and cannot be debarred upon hopes that he may have another son, who, if he had been, would have been preferred to the father; so that same reason and principle ought to hold in tailzied succession. This was likewise urged from our practique, in the case of Bannatyne, brother to the Laird of Corehouse, against Blackwood, where he being only substitute, failing of heirs of the daughter of Blackwood, yet he being living at the time of Blackwood's decease, and his daughters having no heirs, he succeeded to the estate, and the Laird of Corehouse, his brother, was served heir to him, albeit there was then a child of the daughter who was first nominated in the tailzie.

It was replied, That notwithstanding of all these reasons and allegeances, yet David Melville's service ought to be stopped, and never proceed before any inquest, but on the contrary, it ought here to be declared, that the donatar to the non-entry can have only right to the rents of the estate, so long as there are hopes and appearance that the Lord Chancellor may have a second son: And as to the first answer insisted upon, it was replied, that the tailzie was opponed, and where-

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in there could be no ambiguity, or place for conjectures, what was the meaning and intention of the Earl of Leven, seeing, without any condition or limitation, the estate was tailzied, in the first place, failing of heirs of his own body, to the Lord Chancellor's second son, gotten or to be begotten, and failing of him only to the Lord Melville's second son, and that these words "which failzieing," was never to be interpreted "tempore devolutæ successionis," is most clear from the state of succession as it then stood when the tailzie was made; for at that time the Earl of Rothes had no second son, and the same David, second son to the Lord Melville, was then born, and yet, notwithstanding, he was only appointed to succeed failing of a second son of the Lord Rothes, which could not be interpreted in common sense but to have respect *ad tempus futurum*, and so long as there were hopes that he might have a second son, it being then well known to the Earl of Leven that he had none at the time of the tailzie; and further, it was urged, that this construction was confirmed by an unanswerable argument, viz. that the deceased Earl of Leven did survive the making of this tailzie above a year, and notwithstanding that the Earl of Rothes had no second son born during his life-time, and that he himself had only daughters who were looked upon as tender and sickly children, and upon that occasion did often, with his friends and relations, reflect upon the condition of his estate and succession, yet he did never alter the bond of tailzie, whereupon no infeftment was passed, nor qualify the same with that condition that if he should die before the Earl of Rothes should have a second son, or the heirs of nis own body, that then David Melville should succeed, as being the only capable apparent heir; so that his mind and intention being so clear, that there is no *locus conjecturæ* to make David Melville succeed otherwise than is appointed by the tailzie the *prævento termino hæreditatis devolutæ* as to him were to overturn the nature of all tailzies, and contrary to the will and intention of the makers, who did best know to whom they were most obliged to prefer others postponed to them, which militates strongly in this case, there being a mutual tailzie betwixt the Earl of Rothes and the Earl of Leven, not only as being of his name, but as being the chief and come of the family.

It was replied to all the inconveniencies mentioned, which would arise not only to the family, but to just and lawful creditors, and to all superiors, by the want of their vassals, *first*, that Incommodum non solvit argumentum; and to overturn the settled principles of law and the security of all tailzies, it is not a sufficient ground to allege that the makers of tailzies did not foresee fatalities which might fall out or never fall out; and as to the interest of creditors, seeing single and life-rent escheats, wards, recognitions and forefaultures may perpetually put off creditors upon the debtor's delinquencies, which are far greater interests than a single non-entry during hopes, yet our law does not at all provide in those cases for their security, but they are left to the goodness and benignity of the King, who hath a great regard to their interest, out of favour, in the disposal of those rights, according to the merits and deservings of creditors, without any obligation of law; and as to the case now in question, his Majesty's favours is most singular, having

No. 25. burdened the gift of non-entry granted to the donatar, with payment yearly of annual-rents of all debts; and as to the principal sums, they may affect the fee of the estate by adjudications. Likeas, it is most apparent that interest of creditors cannot invert the settlement of estates by lawful tailzies or dispositions, which are done by free persons who are *majores et prudentes*, where they are affected with irritant clauses, whereupon the next nominated heirs to those who commit those faults forbidden by express provisions, their rights and infeftments may be reduced by the persons next nominated in the tailzie, without any *salvo* in favour of creditors, as was lately decided in the case of the Viscount of Stormont, *voce* TAILZIE; and as to the King's interest, and other superiors who have only right to non-entries by the non-existence of an apparent heir, it were against all reason to deprive them thereof upon that pretence, that they might have far greater benefit, and have right not only to a life-rent, but the whole fee of the estate by forefaulture, having a present vassal, whereby the whole fortune and family would be for ever ruined, and no memory thereof preserved. Likeas, if that principle were sustained, that tailzied estates should immediately fall to the existing heir *tempore devolutæ hæreditatis*, not only all the foresaid's hazards by escheat and forefaulture might fall out, but the whole order of succession by tailzies would be altogether frustrated, contrary to the intention of the makers, and all the security that law would give for preserving thereof; whereas the case of a possible heir, his non-existence is *de raro contingentibus*, and will hardly fall out in an age; and as to the argument from the common style of tailzies, that such conditions were never expressed, it was answered and replied, that the same was retorted, and that notwithstanding these great inconveniences might fall out, yet that the same was perfected and subscribed, without any provisions and conditions, in favours of children or daughters, who were to be excluded from the estate, and only have portions of the apparent heirs who should succeed; that being only a delay in the payment, cannot in law take away and make null their father's tailzie and disposition, who was *plene dominus*, and might otherwise dispose the same, having inserted no clause expressly for that purpose, but, on the contrary, having left them to be provided only by an heir in hope, whensoever he should succeed to that estate, but nowise invert the order upon the present payment of their portions.

It was replied to that *second* point of law, That dominium non potest esse in pendente, which is founded upon our own and the Roman laws, and the opinion of great lawyers; 1*mo*, That the ancient Roman law, as to that point, was thereafter altered and changed, as appears by the 9th Para. Institut. De hæredibus instituendis, where hæres institui potest et jure et sub conditione; et in legatis dies incertus pro conditione habetur; and so a person to whom an estate is tailzied tanquam nasciturus, incertum est an sit et quando, and resolves in a conditional institution, and makes the succession pendent during the probability of the person to be procreated; as likewise this principle is clear, D. De acquirenda et amittenda hæreditate, et Leg. 16. De legatis, whereupon the best lawyers of that opinion, as Vinnius, Gudelinus De jure novissimo, and Grotius in his Introduction

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as Jus. Batavorum, and many others, where they are all clear, that persons may decease *partim* testate et *partim* intestate, and may call persons to succeed them, whether *nati* or *nascituri*, albeit they be *concepti neque in utero;* and by our law, in ward holding, an heir-male cannot enter until he be of perfect age, and so *dominium* must be *in pendente;* and Craigie is of opinion, that even by dispensation they cannot enter; and by the universal custom of nations, and the feudal law, the conditional provision of estates is received; and Peregrinus expressly states this case of conditional successions, and resolves in the affirmative.

It was replied to the *last* founded upon our practique in the case of Bannatyne and Blackwood, whereby, without regard to an heir that was first nominated posterior, and to that principle, that *semel hæres semper hæres*, and that albeit hereafter the Lord Chancellor should have a second son, he could never be served; 1*mo*, As to Bannatyne's case, there was never such a practique or decision; but, on the contrary, Major Ballandine having died without children, and his brother, the Laird of Corehouse, being served heir thereafter, Mary Weir, who was first in the tailzie, having an heir, they did pursue a reduction of Bannatyne's and Corehouse's right to that estate of Blackwood, upon the same principles, that it was tailzied *hæredi nascituro* of Blackwood himself, in the first place, and so ought to be preferred to Bannatyne's heirs, who were only substitutes *quibus deficientibus;* but, in respect Major Ballandine had bestowed great sums of money for payment of the debts of the family of Blackwood, the case was submitted to the Lords of Session, as arbiters; and so they did decide that estate to belong to the heirs of Mary Weir, as undoubted of tailzie; but, in equity and reason, they did ordain, that the heirs of Major Ballandine should be refunded of the sums of money given out by him for payment of the debts of that family; and so, if any weight can be laid upon that decision, it militates in favours of the Chancellor's second son, whensoever it shall please God he have any; and it were a good ground, in case David Melville were served, to reduce the service, upon the existence of a conditional heir first instituted, who is secured as fully as if he were in the case of a redemption of an estate from a trustee or *fidei commissaria hæreditas in favorem alterius.*—The Lords, having considered this dispute, with the bond of tailzie, did find, That, so long as there is any possibility or hope of a second son of the Lord Chancellor's own body, David Melville could not be served heir, as second son of the Lord Melville, to the deceased Countess of Leven; and therefore they did declare in favours of Sir William Bruce, the King's donatar, that he had right conform to the gift of non-entry, as it stood affected, in favour of the creditors: Therefore, upon the 24th of February, there being petitions given in for both parties, relating to a new point, alleged not insisted upon, viz. If the mails and duties, during the stoppage of the service, should remain *inhæreditate jacente*, or should belong to his Majesty as caduceary, by reason of non-entry, until the decision whereof they craved the decreet to be stopped, the Lords, as to that new point, ordained, That whensoever the donatar should insist in a special declarator, that David Melville's procurator should be heard

No. 25. upon that new point, but as to the decreet and interlocutor upon the whole first debate, they ordained the same to be extracted.

Upon the 24th July, 1677, there having been an action before the Sheriff of Fife, at the instance of the donatar, for payment of mails and duties, upon a bill of advocation presented by the Lord Melville, the same was advocated of consent to be debated *in præsentia*. It was alleged for the Lord Melville, that the donatar to the non-entry could have no right to the mails and duties, because they were only due in law when the vassal refused to enter, and so were *pœnale ob contemptum*, whereas no such thing could be alleged in this case where there was no apparent heir living, but the rent of the estate should belong to the King, as being *hæreditas jacens;* the King, out of his goodness, having given a gift thereof to the Lord Melville, that they might be applied for the good and standing of the family, so he can have only right to intromit therewith. It was answered for Sir William Bruce the donatar, that he having a prior gift for the use of the Earl of Rothes, Lord Chancellor, and that affected with so many conditions in favours of the family and true creditors, no posterior gift can compete with his, seeing it is a new title unheard of in our law and practique, that there being a gift of non-entry granted by the superior, which includes the whole profits of the lands during that non-entry, yet a posterior donatar, upon pretence of *hæreditas jacens*, should have right, and meddle with almost the whole rents during non-entry; neither can that title of *hæreditas jacens* be a ground of any such pretence, seeing that can only be pleaded in the case of *bona vacantia*, which as to lands and heritages is not proper in our law; seeing if the apparent heir enter not, it returns during non-entry to the superior, who hath the full rents *ob defectum vassali*, and having bestowed the same upon a donatar, he succeeds to his right; neither by our law are the full rents of the estate only due *ob contemptum*, seeing if apparent heirs be infants, and incapable to require their superiors, and by the fault of their tutors and curators, shall only lie out, yet the rents of the lands will belong to the superior, and farther, if they be *in utero*, and not born: Likeas, in ward-holdings, albeit the apparent heirs-male or female should require, yet the superior may refuse, and hath right to the whole duties of the ward-lands until their lawful age. The Lords did prefer the first donatar only as to the retoured duties, but did find that the Lord Melville had by virtue of his gift right to the whole rest of the mails and duties due by the tenants, to be countable to the creditors, and the first heir that should enter, upon that ground that it was *hæreditas jacens*, and so in the King's hands; which to me seemed hard, for these reasons, that it was a new title never heard of before, all non-entries belonging to the true superiors, which gives them an undoubted right to the full mails and duties for the naked want of a vassal, or compensation of his service which cannot be performed, and so belongs to the first donatar, without distinction of retoured duties, or mails and duties, there being no reservation in the first gift of non-entries; as likewise upon that ground, that the non-entry being occasioned by the tailzie of the estate, *hæredi nascituro* in the first place, which

was found by the first interlocutor to suspend the entry of the first heir nominated during the possibility of the existence of the first heir, that being the present vassal's own fact and deed, and the resignation made accordingly in the superior's hands, it gave a full right during the suspension to the superior and his first donatar to the whole rents of the lands, both by the feudal law and our law. No. 25.

Gosford MS. p. 643. *No.* 967. *and* 968.

*** Stair's report of the latter part of this case, is No. 37. p. 9321. *voce* NON-ENTRY.

1688. *July.* TENANT *against* TENANT and the LAIRD of DRUM.

No. 26.
Where an entail is in favour of heirs-male, found, that upon failure of heirs-male, the right devolves to the King as *ultimus hæres*, and not to the heirs of line.

William Tenant, skipper, having obtained a gift of *ultimus hæres* of the lands of Ligtonshiells, as falling to the King by the decease of James Tenant without heirs-male, and thereupon having pursued a declarator against the heir of line; alleged for the defender, that the lands did not fall under the gift of *ultimus hæres*, because James Tenant, by a minute of contract of marriage with the Laird of Drum's daughter in the year 1634, was obliged to obtain himself infeft in all lands wherein John Tenant his father was infeft, and being infeft, to infeft the heir of the marriage in the same; and albeit, by a posterior contract in the year 1637, wherein John Tenant the father was party contractor, the lands were provided to the heir-male of the marriage, which failing, to the said James Tenant, his son, and his other heirs-male, yet James Tenant, by the first minute of contract, being obliged to provide the lands to the heirs of the marriage in general, he could not by any posterior contract restrict the same to the heirs-male; the heirs of line being by the first minute of contract stated creditors to James the father, he could not make any alteration by the second contract to their prejudice; and albeit, James the father was not infeft the time of entering to the first minute of contract, yet John the father having disponed his lands to his son James by the second contract, so soon as the right came in his person, the benefice did accresce to his daughter by virtue of the first contract, especially seeing the contract mentions, that the parties were willing to perform such duties *hinc inde* then as of before the said marriage, and did relate to the first contract; and albeit John Tenant the father was not infeft in the lands of Ligtonshiells, yet the clause in the first contract, by which James the son was obliged to provide the heir of the marriage, in favour of the children of the marriage, all lands wherein John the father was infeft, and whereunto he had given right, did likewise comprehend the lands of Ligtonshiells, whereof he was then in possession as apparent heir, and albeit the first contract should have no effect, but that the second contract should only be the rule which provides the lands to the heirs-male, yet the daughter ought to succeed, seeing it cannot be supposed to have been the meaning of the parties to have preferred the