No 4.
vent tenant, or greater rent, in which case the interest of any person in *re communi* cannot hinder the common advantage of all concerned.

THE LORDS found, That the removing could not proceed without consent of both parties, unless the pursuer offered a more solvent tenant, or a greater rent, in which case the interest of any other person, *in re communi*, could not, without fraud, hinder the common advantage of all concerned *.

*Fol. Dic. v. 1. p. 154. Stair, v. 2. p. 823.*

1681. *November.* HALLIDAY *against* BRUCE of Kennet.

No 5.

IN an action of removing, there being compearance for several other adjudgers, who were within year and day of Halliday, it was *alleged*, that his interest being but L. 1000, he could not remove the tenants and possessors to the prejudice of other adjudgers. THE LORDS found, That Halliday could not remove the tenants, except he found caution for the mails and duties to the rest of the comprisers, so far as concerned their interest.

*Fol. Dic. v. 1. p. 154. Pres. Falconer, No 5. p. 2.*

1680. *July* 23. LADY MARGARET CUNNINGHAM *against* The LADY CARDROSS.

No 6.
The eldest heir portioner has the custody of the writs, and must give transumpts to a younger sister, upon the equal expenses of both.

LADY MARGARET CUNNINGHAM, the only daughter of ——— Stuart, who was one of the two daughters of Stuart of Kirkhill, and sisters to Sir William Stuart his son, pursues the Lady Cardross, the other daughter of Sir James, and sister to Sir William, for exhibition and delivery of the whole writs and evidents of the estate of Sir James and Sir William, both heritable and moveable, to the said Margaret Cunningham, as heir portioner served and retoured to Sir James and Sir William, and as representing the eldest heir portioner, thereby having the prerogative of the custody of the writs. The Lady Cardross compearing, produced several writs, and *alleged*, that she was not obliged to deliver any of these writs to the pursuer, she having equal interest, and being in possession of the writs. 'THE LORDS repelled the defence, and found that the eldest heir-portioner ought to have the custody of the writs, and to give transumpts to the defender as younger heir-portioner, upon the equal expenses of both.' It was further *alleged* for the Lady Cardross, Absolvitor from the delivery of the evidents of Kirkhill and Strabrock, because she produceth a disposition granted by Sir James Stuart her father in favours of Sir William her brother, and the heirs of his body; which failing, to the heir-male of his eldest daughter; which failing, to the younger daughter, the Lady Cardross, &c.; upon which disposition Sir William was infeft, and in respect there were no heirs of his body, nor heirs-male of his eldest siter's, therefore the Lady Cardross is infeft as heir of tailzie to him, and so excludes Lady Margaret Cunningham from any interest in these writs. It was *answered* for Lady Margaret, That if the Lady Cardross accept-

* *See* This case, *voce* LITIGIOUS, as observed by Lord Fountainhall, MS. He names the parties Forbes of Savock against James Buchan.

No 6. ed the disposition of her father to her brother, and claimed the delivery thereof, it ought to be with express declaration, that she should pay and satisfy Sir James Stuart's whole debts, conform to a clause in that disposition, bearing, that Sir William, by acceptance thereof, should be obliged to pay Sir James's whole debts, and perform his whole obligements, contracted or to be contracted, as if he were his heir, or as Sir James himself would have been obliged to pay or perform the same; and especially the Lady Cardross ought to pay and satisfy Sir James's debts produced, and thereby to free the untailzied heritable estate, that Lady Margaret might enjoy the half thereof without burden. The defender *replied*, That she was willing to take up her father's disposition to her brother in the terms it stood, but it was not *hujus loci* to dispute the extent and import of that clause. The pursuer *duplied*, That she could not claim the rights of the tailzied estate, but in the terms of the tailzie, the import whereof might very justly and fitly be declared to prevent pleas between so near relations; especially seeing the pursuer had raised a declarator for that effect, which now she repeated by way of reply; albeit, without it, the Lords might justly declare the import of the clause, seeing delivery of writs is founded upon the point of right to the things disponed by these rights; and, when that right is qualified, the quality ought to be declared and cleared before delivery. The defender *triplied*, That the declarator was not seen and returned, and behoved to abide the course of the roll. The pursuer *quadruplied*, That this cause having been formerly reported, 'THE LORDS sustained the declarator as an incident process, and gave the defender a week to see it, which was done accordingly;' and it is most ordinary that the Lords do receive all incident processes repeated by exception or reply, without abiding the course of the roll; as exhibitions of writs necessary for the cause, either for the pursuer or defender; which exhibitions being most frequently incident in processes, are therefore called ordinarily incidents; and, likewise in suspensions, commonly reductions are received summarily; and in possessory actions, when the point of possession is dubious, petitory actions are received, and in all cases, reductions and declarators. The defender *quintuplied*, That incident processes are never received upon mere contingency of the matter, but only when they afford a relevant defence, reply, or duply, in the principal cause, wherein they are craved to be admitted *incidenter*, otherwise the roll would become elusory, and upon pretence of contingency no man would be secure when to attend or have the benefit of the *inducia legales* by the roll. The pursuer *sextuplied*, That the declarator here afforded a reply in the process of delivery, viz. 'the defender cannot be assoilzied from the delivery of the evidents of the tailzied estate, unless it were declared in the terms of the foresaid clause, according to the true meaning and import thereof, as the Lords shall find the same just.' 'THE LORDS sustained the reply, and admitted the declarator, and found that the Lady Cardross, as heir of tailzie to Sir William, ought to have the writs of the tailzied estate delivered solely to her, upon the terms exprest in Sir James's disposition to Sir William, the import whereof the

No 6.

Lords would now declare.' The defender then *alleged*, That the import of this clause could only be, that Sir James Stuart, his eldest son, being weak, did dispone his estate to his second son, under this obligement, that by acceptance of that disposition, his son should be obliged to pay all his father's debts, contracted or to be contracted, which was just and rational for him to provide in favour of his creditors, who could not reach Sir William for Sir James's debts contracted after the disposition, neither even as to the anterior debts, he being the second son, and not *alioqui successurus*, and therefore they could only reduce the disposition as fraudulent *sine causa onerosa*, which no just man would put his creditors to; but Sir James never dreamed to exhaust the estate he had disponed to his son for preserving of his family and memory, and to lay all the debt thereupon, and to free his other whole estate, even his moveables, to his wife and legatars, and his entailed estate; and, therefore, the meaning of that clause can only be, that Sir William should be personally liable for his debt as if he were his heir, which must be understood, as if this disposition had been a bond of tailzie, obliging Sir James and his heirs to resign his estate in favours of himself, and after his decease to Sir William his son, and his heirs of tailzie, exprest in the disposition; so that if Sir William were heir of tailzie, he could be only liable to his father's creditors *suo ordine*, after the executors and heirs of line were discust, and the estate competent to them were exhausted, upon which terms the Lady Cardross is content the clause be declared. It was *answered* for the pursuer, 1*mo*, That albeit there were here a direct tailzie, and that Sir William had been heir of tailzie to his father, he would have had *beneficium ordinis* even against the creditors, who behoved first to be discust, and exhaust the executry and the untailzied estate, unless the tailzie itself had born simply an obligement to pay the debt, as in this case; for thereby *provisione hominis tollitur provisio legis*, and the heir of tailzie is liable in the first place, seeing it is in the option of the defunct what heir to burden; and though all representing him would be liable, yet he can change the order, which hath been frequently done, and sustained; as when parties oblige themselves, and their heirs succeeding in a tailzied estate, even by bonds and obligations a-part, the heir of tailzie would be liable in the first place, but much more here where Sir William was never heir of tailzie, but had only a singular title by a disposition, which disposition makes that estate tailzied as to Sir William's heirs, who neither are nor can be heirs to Sir James; and if Sir James his creditors were pursuing them, it could not be as heir to Sir James in this tailzied estate, but as heirs to Sir William, who by this clause was obliged to pay Sir James his debt; and if the creditors were pursuing the Lady Cardross, she could not except, and say, no process, unless the executors and heirs of line of Sir James were first discust, which would necessarily follow, if this interpretation hold; but the creditors would exclude that exception, seeing the defender is not heir of tailzie to Sir James, but liable by an obligement in the disposition to Sir William; and, if the case were now to be debated, as it was

No 6. when this disposition was contrived, would it not be evident that Sir James his eldest son, who had no provision but the untailzied estate, could not be exhausted and rendered miserable, either by the course of law, or by the design of the father, who might have tailzied his whole heritable estate, by leaving out a considerable part thereof, and yet obliging his son to pay his whole debts, not in *subsidium* after exhausting his moveables and untailzied estate, which certainly he would have exprest if he had so meant; but nature and duty would infer, that his meaning was to leave his untailzied estate to his eldest son, who had not one sixpence of provision beside; and though the eldest son died before his disposition was perfected, yet the nature and design of it must have been still the same. The defender *replied*, That whatever might be pretended in the case of Sir James his immediate heir, as if his eldest son had lived, yet there is no other subsequent successor can pretend the like interest or right; for Sir William, by the disposition, becoming debtor in this clause, the creditor thereby was his father's heir of line, viz. his brother; but his brother dying, he himself became his father's heir of line, and so became both debtor and creditor, *et confusione tollitur obligatio:* therefore this pursuer can never claim Sir James his untailzied estate to be made free, because Sir William was actually served heir to Sir James, and so the pursuer cannot be served heir to Sir James, but Sir William; and it is certain, that confusion is *modus tollendi obligationis*, as effectual as solution, compensation, or discharge; and the obligation being once extinct in Sir William's person, it can never revive more than Sir William as heir of line had renounced that clause, and declared his untailzied estate liable as this estate for his and his father's debts. It was *duplied* for the pursuer, That confusion was an absolute extinction, while heirs did succeed in *universum jus quod defunctus habuit* both active and passive; but now when there are distinct heirs and kinds of succession, executors in moveables, heirs of line, and heirs of tailzie and provision, the nature of tailzies over-rules the succession and terms of investiture, so that when provisions and obligements are put upon heirs of tailzie, either in favours of creditors, or of heirs of line, these take ever place when different persons fall to be heirs of tailzie and heirs of line; and the pretence of extinction by that concourse, doth make only a suspension of these obligements, and not an confusion or extinction, or otherwise such clauses in tailzies would be evacuate and elusory; and here it is clear, that Sir William and all his heirs of tailzie were obliged to pay all his father's debt, and could never object to his father's creditors the benefit of discussion of the executors and heirs of line, but behoved simply to pay, and the law gives them no recourse against the heirs of line; and albeit the pursuer be not immediate heir of line to Sir James, yet she is heir by progress to him, and he that provides for his heirs, is never understood to provide only for his immediate heirs, but for all his subsequent heirs in general; and in this case, Sir William was only heir in general to his father, but his father had considerable rights undisponed, whereupon infeftment followed, and wherein the pursuer will be Sir James his immediate

heir of line; and if Sir James had foreseen the case as it now stands, that the second daughter would succeed to the bulk of his estate, worth L. 10,000 yearly, and married to another family not of his name, and that his eldest daughter, or her daughter, should, by this order of discussion, be excluded from all benefit of his succession, it could not be presumed he would have so ordered, but rather that his younger daughter should have paid his debt out of the tailzied estate, being but a small burden out of such an estate, and so she should have the remainder of the tailzied estate, and the equal half of the untailzied estate, free of burden, and that the pursuer his oye by his eldest daughter with the Earl of Glencairn, should have the half of his untailzied estate free of burden also. No 6.

The Lords found the Lady Cardross as heir of tailzie to Sir William her brother, to be liable to pay all the debts in the foresaid clause in the disposition by her father to her brother simply, without the benefit of the order of discussion, and without affecting or exhausting the untailzied heritable estate. *See* Tailzie.

*Fol. Dic. v. 1. p. 154. Stair, v. 2. p. 787.*

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1707. *March* 5. Cowie *against* Cowies.

No 7.
In the end of this case, it is decided in conformity with the above, that the eldest heir-portioner is entitled to the custody of the writs. The case chiefly relates to the eldest daughter's right to the mansion-house and garden, and is referred to *voce* Heir-Portioner.

John Cowie, portioner of Bothkennar, leaving behind him five daughters, and an heritage about five chalders of victual, the four sisters take out of the chancery a brief of division, directed to the Sheriff of Stirling; which being advocated to the Lords, the eldest daughter claimed the mansion house, yard, and orchard, *jure præcipui et ratione primogenituræ*; for though law had introduced an equality among female heirs-portioners, as the Roman law did amongst all children whatsomever, whether sons or daughters; yet our lawyers had given that prerogative to the eldest daughter, to have the mansion-house, without division. *Alleged* for the younger sisters, the said maxim held in towers and fortalices, and large houses on baronies; but this was only a mean country-house, on a small interest of five chalders of victual, little differing from a tenant's sit-house, and the law speaking of *turres pinnatæ* could never mean such thatched buildings as this. *Answered*, This house was built for the accommodation of the heritor, and not for the labourers of the ground, there being other tenants houses there to serve the use of agriculture, *et ad rem prædii rustici pertinentes*; and is three stories high, and has above twenty glass windows; and such buildings *cum contignationibus* are ever reputed for the use of the heritors; now since the use of building houses with barrikin walls and fosses about them (as in the time of the old feuds) is generally ceased. The Lords found, this being the principal thessuage on the ground, and there being other houses for the tenants, therefore this ought to belong to the eldest daughter and heir portioner. But on this arose a second question more difficult, whether she ought not to give some satisfaction or equivalent to the rest of the heirs-portioners in