No 4.

transmitted by law to her heirs, as all other heritable and real rights; and those of that opinion did found themselves upon this ground, that the power to dispone, albeit it was not real by infeftment and investiture, yet it was of the nature of other real and heritable rights, whereupon never any infeftment did follow, such as rights of reversions or dispositions, bearing procuratories of resignation and precepts of sasine; and, that a power to dispone of lands is of that same nature and quality as if they were really infeft in such lands, and so, by the law of succession, they ought to be transmitted without distinction; but others, whereof I was likewise one, were of another judgment and opinion, that the power to dispone depending upon an uncertain condition, that might exist or not, it was a mere faculty, and could never give right to any person unless it had been actually exercised by the Lady, and could noways in law belong to her heirs, unless she had disponed it; the power being personally to her only, without mentioning heirs at all, who, upon no ground of law, by any brieve raised out of the Chancellory, could be served either heir special or heir of provision to such a faculty, there never having been any such practice or ground for the same; but, on the contrary, it being often decided, and generally holden as a principle, that, in contracts of marriage, there being a special provision in favours of the wife, reserving to her to dispone upon her half, or a part of the tocher to whom she pleased, failzieing of heirs of the marriage, that if there be no children, and she die without making assignation, or any right thereto, that power is extinguished as being a personal faculty, and can never belong to her heirs; and here the case is far stronger, seeing a wife gives her own tocher, expressly affected with that reservation and power; whereas here the Earl of Callender did grant this conditional power to dispone of all that which was his own conquest, and wherein the Lady could never have any right, and was in effect of the nature of a donation, wherein all conditions ought to be most strictly interpreted, and not conform to conditions in mutual contracts and obligations, founded upon reciprocal performances, which are interpreted *secundum æquum et bonum*, which is the opinion of all lawyers, and is so declared by Mantica in his treatise *De tacitis et ambiguis conventionibus*, *Instit.* § 4. *l.* 14. which expressly meets this case now in question, for there he affirms, *conditio si liberos non susceperat non requirit veritatem actus permanentis sed transeuntis tantum*; but the contrary was found upon the 26th of June 1676, which was likewise hard.

Gosford, MS. p. 546. *No* 867. & 868.

1705. *July* 11.

GEORGE DUNDAS of that Ilk *against* WILLIAM DUNDAS, Merchant in Edinburgh.

No 5.
One having resigned his estate in favour of his

THE said William being the only son procreated by Ralph Dundas of that ilk, with Mrs Elisabeth Sharp, daughter to Houston, and laying claim to twenty-

No 5.
second son, and his heirs-male, with a clause of redemption in favour of his eldest son, and the heirs-male of his body, reserving his own liferent, and a power to dispone and contract debt, in the same manner as if the right had not been granted, did thereafter limit the said power of redemption provided in favour of his eldest son, so that it should not be exercised unless with the consent of certain persons named. It was *objected*, that the reserved faculty did not empower the father to do mere gratuitous or arbitrary deeds, such as to limit or discharge his son's right of redemption. The Lords found the father had full power to alter the succession, or to discharge the right of redemption.

four chalders of victual, provided in his grandfather's contract of marriage with Lady Christian Leslie, daughter to General Leslie, afterwards Earl of Leven; the present Laird of Dundas raises a declarator against the said William, to hear and see it found, that the said William has no title, claim, nor interest to any part of these lands, by virtue of any clause contained in the said contract providing the fee to the heir male of the marriage, and that it was in the power of the father to tailzie them to any other of his sons, exclusive of the said Ralph; and that, having done so, it was a valid, legal, and preferable deed. *Alleged* by the said William, That, by the said contract *anno* 1639, it is declared, that the heir-male of the marriage shall have right to bruik and enjoy the lands therein mentioned, extending to twenty-four chalders of victual; and the party-contractor obliges him to make sufficient infeftments, tacks, and other rights thereof to the said heir-male; and though it bear these words, 'that the said heir-male is not to be infeft in the fee of these lands,' yet that can never restrict it to a liferent, seeing these words import no more but this, that it is not designed to infeft him presently in the fee, there being neither procuratory of resignation, nor precept of sasine insert in the said contract, whereupon actual infeftment can instantly follow; yet there is an obligement to grant it, by which his heirs can yet be compelled to perfect it; and contracts of marriage being *uberimæ fidei*, they ought to be favourably interpreted, and extended conform to the import of the clauses used to be insert therein; and now there being an obligation to infeft, it must be understood *in terminis juris*, 'to be in a fee,' and not merely in a liferent; for *quod inesse debet illud inesse præsumitur*. *Answered* for the Laird of Dundas, That the custom of their family was to succeed by service and retour, conform to their ancient tailzies to the heirs-male; and therefore, in this contract, the lands provided to be infeft in were only by way of aliment and appanage during life, (as is practised in the great families in France), and not in fee, as appears by inserting the word *tacks*, which is not a habile way to convey the fee; and the very narrative of the clause explains the whole, declaring in the very entry, that no fee was to be given, and which words cannot bear that forced construction, that it only wanted a procuratory and precept; for, if a fee had been intended, there was nothing more easy and ordinary than to insert these. It is true *bona fides* should predominate in all transactions, but more especially in contracts of marriage; yet there is nothing more agreeable to the principles of equity and the *patria potestas*, than that the father should be judge of the merits and deservings of his children, and if they turn refractory and debauched, as this Ralph did, then by a tailzie to dispone it in favour of Walter his second brother, and his heirs. *Replied*, Can it be reasonably supposed, that the Earl of Leven would bestow his daughter, and 24,000 merks of tocher, and leave his grandchild wholly at reverence, and no provision but a mere liferent? and therefore it must be certainly a fee.——THE LORDS thought the contract somewhat heteroclite and anomalous, and the clauses thereof not very consis-

tent; and, for clearing the same, appointed it to be heard in their own presence.

No 5.

On the 26th current, the LORDS, by a plurality of votes, found the provision made by the contract of marriage in 1639, to the heir-male of that marriage, was not a fee, but allenarly a liferent or maintenance, till he should succeed, conform to the tailzies of that estate, by service and retour; and so declared the present Laird of Dundas's right against William; and found no need of deciding the other points, how far George and Walter could exclude Ralph, seeing it is now found, that Ralph and his descendents had no fee by that contract.

There was likewise a process depending before the Commissaries of Edinburgh, for proving the said William's bastardy, on his father Ralph's being impotent; but that had no connection with the points debated before the Lords. What rendered the trial of his impotency more difficult was, that it was intented after all the parties were dead; and though Ralph once disowned the children, yet afterwards he retracted and acknowledged them to be his; and though, upon dissection, his testicles were found very small and soft, no bigger than a pea or bean; yet this being after his death, sickness might exceedingly lessen and diminish them, and *that* was no mark against their former magnitude; but such trials are not only uncertain, but carry much odium and reflection with them; though it is a sad abuse where it happens in ancient and honourable families. *See* APPENDIX.

Fol. Dic. v. 1. p. 290. *Fountainhall, v. 2. p.* 283.

*** Forbes reports the same case more fully:

1705. *July* 25.

A contract of marriage, in the year 1639, being entered into betwixt Walter Dundas, son to George Dundas of that Ilk, and Mrs Christian Lesly, daughter to Sir Alexander Lesly, afterward Earl of Leven; the said George and Walter Dundasses provide to the said Mrs Christian Lesly a yearly liferent of 24 chalders of victual, partly localled, and partly by way of annuity out of the estate of Dundas, of which she was to come to the full possession after the decease of Dame Anna Monteith, mother to the said George, and Elizabeth Hamilton his Lady; but was restricted during their lifetimes to a lesser provision. After all the contract bears, 'It is agreed and declared, that 'albeit the said Walter Dundas and his heirs male to be got in the said 'marriage are not infeft, nor appointed to be infeft in fee in the said 'liferent lands, and others above written, nor provided to the teinds there'of, yet after the decease of the said Mrs Christian Lesly, the said Wal'ter in his lifetime, and after his decease the heirs male to be gotten in the said 'marriage, shall have right by virtue of these presents, to bruik the said lands 'and teinds, with the foresaid annuity provided in liferent during the lifetimes 'of the said George Dundas and Dame Anna Monteith *conjunctim;* and after 'their decease, and of the longest liver of them two, they shall have right to

No 5.

'the hail liferent lands, teinds, and others above written, wherein the said Mrs 'Christian is appointed to be provided in liferent, reserving always to the said 'Elisabeth Hamilton her liferent of the Easter Place of Dundas, office-houses, 'and half of the Easter and Wester Yards. and to set, raise, remove, output, 'and input tenants thereintil, as well not infeft as infeft therein. Likeas, 'if need be, the said George Dundas binds and obliges him to make sufficient 'infeftments, tacks, or other rights to the said Walter his son, and his heirs 'male foresaid to the effect above specified, but prejudice to the said Mrs 'Christian her lifetime of the same, in manner above declared.' There is also a clause subjoined in these terms, 'And because the lands and living of Dun-'das, and teinds belonging thereto, are tailzied to the heirs male, so that in 'case there be only daughters procreated of the said marriage, they will be des-'titute of provisions, therefore the saids George and Walter Dundasses bind 'and oblige them and their heirs male, to pay the saids daughters certain sums 'in name of tocher, in manner mentioned in the said contract.'

There were two sons of this marriage, viz. Ralph and Walter; Ralph the eldest proving loose and dissolute, there was a tailzie of the estate of Dundas made in the year 1669, by George Dundas and his son Walter, whereby they resign in favours of the said George, Walter and Ralph, Walter's eldest son in liferent *successive*, and to Walter Dundas his second son, and the heirs male of his body in fee; which failing, in favours of George, brother to the said Walter elder, and the heirs male of his body. Then follows a substitution in favours of several other persons, with a right of reversion to Ralph Dundas and the heirs male of his body; and a faculty to George and Walter Dundas, or either of them, to dispone and contract debts. In the 1671, George, after his son Walter's death, renewed the foresaid tailzie, with this alteration, he suspends the right of reversion competent to Ralph, until he should procure the consent of some friends therein named, who were empowered to discharge the reversion if they thought fit. These trustees did afterward discharge the reversion, whereby Ralph being wholly excluded, and Walter his younger brother dying without heirs, George Dundas the present heritor succeeded; and for clearing and establishing his right, commenced an action of declarator against William Dundas merchant in Edinburgh, who laid claim to the estate as son and heir male to Ralph.

Alleged for the defender; That the fee of the 24 chalders of victual at least, provided by his grandmother's contract of marriage, was so settled upon Walter Dundas her husband, and the heirs of the mariage, that he as heir to Ralph, who was heir of the marriage, could not be debarred from the same by any gratuitous or voluntary deed of his predecessors.

Replied for the pursuer; There was no fee provided by the foresaid contract, but only a sort of liferent, aliment, or appanage to Walter and his heirs male of the marriage, till the succession fell to them upon the death of old George, conform to the ancient infeftments. For Walter Dundas and his heirs male, as

the clause of the contract runs, 'were neither infeft nor appointed to be infeft 'in fee of the said liferent lands;' which imports that the provision was only a temporary right, and that the General and his daughter relied upon the old infeftments of the estate, whereby it was tailzied to heirs male, as the contract bears. In the which contract also certain portions to daughters are provided in case of the not existence of heirs male. Besides, it is not to be supposed, that the parties had any view of providing so small a part of the estate in fee; especially where there is no obligement to make resignation, but allenarly to grant infeftments or tacks; and where Walter and the heirs of the marriage were to uplift 11 chalders 12 bolls by way of annuity; now, a right of tack or annuity is incompatible with a provision of fee.

No 5.

Duplied for the defender; If the General rested satisfied with the old tailzies in favours of heirs male, and followed the faith of the parties contracting with him, that his male children would succeed by virtue of these destinations, he hath been either imposed upon, or the faith then given hath not been observed; since his grand-child was excluded: And whatever prejudice might have been taken up against Ralph, it was hard to extend it to his innocent children, who at this day seem no ways undeserving the succession of the estate. Yet the General has indeed in part relied upon the faith of the old infeftments, though not wholly; in so far as he has secured something by the contract in favours of heirs male of the marriage, which must be a provision of fee. For, *1mo*, Instead of the words liferent, aliment, and appanage, which are not to be found in the controverted clause, we find, to bruik, enjoy, and have right, terms that expressed indefinitely, and without limitation, do always imply the conveyance of, or obligement to convey a right of property. For when the granting of a temporary right is only designed, the quality and restriction of during lifetime, for aliment and maintenance to such an event, &c. are adjected. *2do*, As the words so indefinitely expressed imply alienation, it was rational to think this was the design of parties, a considerable portion being given, which deserved the conveyance of the whole estate. But because the old infeftments were so conceived, and the exclusion of the lineal descendent heirs male could hardly be imagined, it was thought sufficient to secure them expressly in the lands provided to the mother in liferent; which, as it answers the objection touching the smallness of the provision, is an argument of the greater ingratitude, that such a small part should have been also carried away. *3tio*, The initial words of the clause do not at all derogate from the provision of fee; for they imply only that the foregoing provisions being altogether relative to the Lady's liferent, without mention of heirs of the marriage, (which are usually first spoken of in such contracts, at least by way of substitution to the conjunct fiars), the controverted clause was adjected to supply that defect. *4to*, The provision being chiefly to take effect after the decease of old George, it could be no other thing than a right of fee; for Walter and his heirs male were then to succeed to the whole estate by the old infeftments. *5to*, The fore-part of the con-

No 5.

tract securing an annuity to Walter and his heirs male of the marriage is not inconsistent with the provision of fee; for the fee of the whole liferent lands was not to take effect till the death of old George and Anna Monteith. But as Mrs Christian Lesly's provision of 24 chalders of victual was restricted to 20, during the lives of these persons, to be made up partly by locality, and partly by annuity; so the provision in favours of Walter and his heirs male, during the foresaid interval, was to be bruiked according to the same extent; not to alter the nature of it, but only to qualify the method of possession for that time. And it is no new thing to see provisions of fee in favours of heirs of a marriage qualified as to the possession, and method of uplifting, during the course of liferents. *6to*, George's obligement to grant sufficient infeftments, &c. can only be understood of infeftments in fee. *7to*, If the provisions and obligements in the contract, concerning the liferented lands, had only been intended for an aliment to the heirs male, what should have been the effect, if Walter's Lady survived her husband, she being simply provided to the liferent of the whole, and the provision to the heirs male expressly declared not to prejudge her right? Therefore it cannot be understood to import any right inferior to an infeftment of fee or property, as contradistinct to the Lady's liferent reserved in the same clause. It is a mere quibble that is taken from the word tacks; for, first, a general and indefinite obligement to grant sufficient infeftments, tacks or, other rights, must always be understood of such rights in the option of the receiver, whereby the person obliged may be fully denuded. The adjection of tacks may again be very well understood with relation to the teinds, which are here likewise conveyed, and that by way of tacks, that George might not be liable to warrant the absolute right to the teinds, when perhaps he himself had only temporary rights. As to the argument drawn from the clause mentioning provisions to daughters, because the estate is tailzied to heirs male by the old infeftments, it is of no import in the present debate; for there being only a provision of lands to the value of 24 chalders of victual in favours of the heirs male by the contract, and the bulk of the estate remaining upon the foot of the old infeftments, it was not improper so to introduce the daughters' provisions, without taking notice of that small part provided to heirs male by the contract.

Triplied for the pursuer; *1mo*, The words of the contract are not, that Walter and the heirs-male of the marriage should have right to the whole jointure-lands, after the decease of old George; but after him and Dame Anna Monteith's decease, the longest liver of them two; which provision may evidently point to give them right after Dame Anna Monteith's decease, if she should chance to survive old George, and not after his death, he proving the longest liver; because there the fee of the whole estate devolving on them by the old infeftments rendered the provision useless. But the true cause of mentioning heirs-male of the marriage, was to secure them of a competency for subsistence, notwithstanding of the liferents and burden of debts then on the estate;

No 5.

to the effect, that even Walter himself entering in a second marriage, might not be in a capacity to wrong them by providing these lands as a jointure to the second wife. The contract bears indeed, that after George's decease, Walter and the heirs of the marriage should have right to bruik; but this the parties foresaw would fall out by devolving of the fee, and not by the contract. *2do*, It is evident by the very air of the clause, that the obligement to grant infeftments, tacks, or other rights, and that only if need be, was merely intended to secure Walter, and the heirs male of the marriage in a settlement of subsistence during their own time, which might be done even by infeftment without giving them any fee; and the adding of tacks or other rights to infeftments show that they were all promiscuously named only for the more security of the foresaid liferent provision: Though the defender would have tacks relate to teinds, and infeftments to lands; the clause makes no such distinction, but mentions them promiscuously; nor indeed were any teinds given in jointure that could be secured by tacks, since all these teinds were drawn by the master from the tenant, and so were carried with the provision of the lands. *3tio*, That it was the very intention of parties from the beginning to have the fee descend by virtue of the old infeftments, without any limitation of a contract, is further cleared from the ushering in the security to be given to Walter, and the heirs of the marriage, for bruiking of the liferent lands, with a 'likeas if need be;' which argue strongly that the security of the provision by infeftment, tack or other right if need were, was the only thing intended without the least design of granting a fee, which could not be settled without infeftment.

THE LORDS found, that the clause in the contract 1639, to the heir male of that marriage, doth not import a fee, but allenarly a liferent, or maintenance till he should succeed conform to the tailzies of the estate by service and retour.

1706. *January* 2.—GEORGE DUNDAS of that ilk having insisted in his declarator above-mentioned, (July 25. 1705.) the defender *objected* that there could be no decreet of declarator; because, *1mo*, By the contract of marriage betwixt Walter Dundas of that ilk, and Mrs Christian Lesly, the heirs-male of the marriage are to succeed to the estate of Dundas, which runs in these terms, 'In case there shall not be heirs-male procreate betwixt the said Walter Dundas and Mrs Christian Lesly to succeed to the lands of Dundas;' importing as much as that it was agreed that the heirs male of the marriage should succeed; for, contracts of marriage, how simply soever expressed, if plain and distinct, are still to be understood *cum effectu*. And though a destination to heirs-male contained only in the rights and evidents of the estate might be alterable by the fiar, yet any alteration thereof, when contained in the contract of marriage, would be *contra fidem tabularum nuptialium*; therefore, George and Walter Dundas, the parties contractors, could, by no gratuitous deed, defraud the heir-male of the marriage, who was heir of provision by the con-

No 5.

tract; and far less could they disappoint the whole issue thereof of the right of succession. 2*do*, Ralph, and the heirs-male of his body, by the first bond of tailzie made by old George and his son Walter, being allowed to redeem the estate upon payment or consignation of an angel of gold, that right of reversion could not be infringed or taken away by any posterior deed of old George, who became, by the tailzie, a naked liferenter, in so far as he reserved only a power to himself to sell and contract debts; under which reservation of doing onerous deeds, a faculty to alter the succession, and gratuitously to discharge the reversion competent to Ralph and his foresaids, is not comprehended; all such reservations being strictly to be interpreted, as downright encroachments upon the native effect of fee and property, and the altering of the channel of succession to the prejudice of the issue of the marriage, was a direct contravention of the contract of marriage by a fraudulent arbitrary deed without any necessary cause, which George could not do, though considered in the capacity of a fiar. 3*tio*, Albeit the foresaid reservation were sufficient to empower George to make the second tailzie *quoad* these parts of the estate of Dundas, whereof he was absolute fiar before the first tailzie; yet, as to the lands of Overnewliston, wherein Walter stood publicly infeft as heritable fiar before that first tailzie, the reservation could not empower George, who had only a liferent-right of some duties out of these particular lands, to defraud Walter's heirs of them. 4*to*, Albeit the power of discharging the reversion had been duly reserved to George, he did not exerce the same by the posterior deed, but only suspend the effect of the reversion, until Ralph or his heirs should obtain the consent of some friends; which was only a temporary impediment or restraint upon Ralph's free use thereof, designed as a mean to reclaim him from disorderly courses, which naturally ceased upon his death, or his returning to frugal management; for the friends could not dissent without a reasonable cause, and the want of their consent (when no reasonable cause could be given for their refusing to concur) might be supplied by the authority of a competent judge. And as George did not absolutely discharge the reversion, he could not transmit by delegation such a personal faculty to others; far less could they exerce it by virtue of such a delegation after his death, since *morte mandantis expirat mandatum*; and all delegations are mandates. 5*to*, The discharge of reversion is in itself null and cannot be regarded, because the friends appointed by George in the second tailzie to be judges of Ralph's miscarriages, ought all to have convened and precognosced the same before discharging the reversion; whereas only the major part of them met, which was not sufficient in a matter of singular trust and judgment, where there was a delegation and personal confidence. 6*to*, Albeit George could have delegated the faculty to these friends, and they could have discharged, they could not do it arbitrarily, but, upon cognition of Ralph's continued miscarriages, which was not observed; for the very naming of them judges to his behaviour obliged them to proceed *secundum arbitrium boni viri*, and the rules of law and equity; nor, could their

sentence upon this account, after cognition, have justly gone beyond the person of the delinquent. And therefore Ralph's miscarriages could never afford a reasonable ground to deprive his innocent children of their just right of succession.

No 5.

Answered for the pursuer; Seeing the Lords have found, that there was no obligement of fee of the lands provided in liferent to Walter's lady, intended in favours of the heirs-male of the marriage, where it might naturally have occurred; *multo minus*, can it be thought by the bare supposition of the estate's being provided by the old infeftments to heirs-male premised to the daughters provisions, any obligement to heirs-male was designed in the contract, *ubi id minime agebatur*. Consequently, it is unaccountable to conclude, that Dundas, elder and younger, could do no gratuitous deed to frustrate an obligation that in effect never was in being. Besides, any expectation that the Earl of Leven, and contractors on the Lady's part, could have in behalf of the heirs-male of the marriage, was fully satisfied by providing the fee to Walter, the second son thereof. *2do*, The reservation in the tailzie 1669, is as broad and ample as could be conceived; and, it is groundless to allege, that it carried a power to sell and contract, but not to discharge Ralph's reversion gratuitously; for he that reserves a power to sell and dispone, &c. sicklike and as freely in all respects as if the bond of tailzie and reversion therein contained had never been granted, hath a free and absolute power to alter and discharge the reversion at pleasure. And reservations in favours of persons denuding themselves of the fee of their estates in favours of their own heirs or descendants, being a right of property not conveyed, are amply to be interpreted in favours of the disponers; so that George, the absolute and unlimited fiar might discharge the reversion as he did, which was a most rational deed to prevent the confusion, ruin, and dishonour of the family, of more weight than any inference from an imaginary implied obligement. *3tio*, As Walter, the fiar of Overnewliston might have re-instated George his father in the property, by re-disponing the same to him; so he might *a majori*, by subscribing to the tailzie 1669, confer upon his father a lesser interest, by taking the reserved faculty to the longest liver. *4to*, The reservation of a faculty to dispose as freely as before making of the reservation, is not personal; but he that can absolutely dispose at his pleasure may empower trustees for exercing what himself might have done; and who doubts of this must be an absolute stranger to the Roman *fideicommissa*, and laws of other nations. George's deed suspending the reversion being never taken off, and now, as things stand, impossible to be taken off, is equivalent to an actual discharge, and he thereby substituted the pursuer to the heirs of young Walter; so that, by old George's own deed, Ralph, and the heirs-male of his body, stand perpetually excluded. It is needless to inquire what the friends would or should have done, if Ralph had become a better man; since he was never reclaimed, and they who were made judges of his manners and merit, never consented, nor were required to

No 5.

consent to his using of the reversion; but also, Ralph and his heirs-male were so excluded by the deed of old George, though the delegates had never interposed. Delegations and trusts of this kind are not to be considered as temporary mandates, that die with the mandant; for when a mandate like this is to take effect after the mandant's death, it falls not by his death, yea, most of mandates according to the meaning of the mandant, are now reputed to subsist even after his decease. The *boni viri arbitrium* can take no place here, where George has already determined upon the causes why he thought fit to debar Ralph his grand-child from the succession, and allowed none but certain friends to decide the reversion; and whatever pretence there might have been for the *boni viri arbitrium*, if they had not consented through mere negligence or omission; to admit of it now, when the friends have expressly determined the matter, were to make a new deed, and not to complete what Dundas had formerly done. 5*to*, The discharge of the reversion is most formal in the terms of the trust which was expressly committed to the major part of the friends named, and so many do sign the discharge. This case cannot be regulated by the ordinary rules of judicial procedure, since no parties were to be cited, nor probation to be led, or any other formality observed, each person's proper knowledge being the sole rule of their judgment. Besides, tutors may subscribe in the same manner; and, even the presence of a quorum is sufficient to authorise the sentences of judges. The trust here committed to the friends, making them judges of Ralph's miscarriages, was not so extraordinary, if it be considered that, without regard to new miscarriages, they were empowered to proceed upon those already precognosced by the grand-father. 6*to*, George himself did first exclude Ralph and his descendants from the reversion, and the further power entrusted to the friends, was exerced by them upon the very grounds precognosced by himself, because never amended or removed; which trustees being all men of honour, and Ralph's nearest relations on both the father and mother side, not to be suspected of malice or ignorance of his conduct, their discharge of the reversion must be looked upon as the determination of an impartial inquest; nor can Ralph's heir-male, however innocent, have the least pretence to succession, whose father is excluded, from whom any right he could claim, must descend.

Replied for the defender; 1*mo*, If the tenor of the clause in the contract did not import a provision of succession in the estate to the heirs-male of the marriage, this absurdity would follow: That in case of the existence of an heir-male of the marriage, the provisions in favours of the daughters would fall, being only made upon supposition of the failing of heirs-male; and, if that heir-male were not to succeed by the contract, it could not be said that any settled provision was made for the issue of the marriage, male or female. 2*do*, There is a great difference betwixt rights and infeftments of trust, and the delegation of the faculty in question; for, rights of trust convey the subject disponed thereby to the trustee, so as he may implement the terms of the trust after the

disponer's death; but here, no right to any thing is transmitted, but only a commission given to trustees for exercing a faculty reserved to the granter, which did not divest of any right, but was revocable as other commissions, and became extinct when not executed in his lifetime.

No 5.

THE LORDS found, That the contract of marriage of Walter Dundas elder, with his Lady, contains no obligement, express or implied, to provide the estate of Dundas in favours of heirs-male of that marriage; and, that old George, by virtue of the faculty reserved in the tailzie 1669, had full power to divert and alter the succession, or suspend and discharge the reversion in favours of Ralph, and the heirs-male of his body; and found, that the said George, elder, his discharging of Ralph's liferent, and suspending the force and effect of the reversion reserved to him by the tailzie, until he or his heirs-male should procure the consent of the friends therein mentioned, with power to these friends to discharge the said reversion, and their discharging accordingly, doth resolve into a perpetual suspension or extinction of the reversion; and that the friends or their heirs could never thereafter concur in the redemption, nor Ralph redeem without their concourse; and, that the heirs-male descending of him are excluded by the said suspension and discharge, as effectually as he was; and found, that Ralph and his heirs-male, are excluded from the lands whereof Walter, elder, had the fee before the tailzie 1669, in the same way as from the rest of the estate, in respect of the foresaid faculty reserved to George and Walter, and longest liver in the said tailzie; and that George the survivor exercised the said faculty by the second deed, and that the discharge by nine of the eleven friends, being the plurality, is sufficient. *See* SUCCESSION.

Forbes, p. 31, 59.

1712. *July* 4. RENNY and ROBERTSON *against* MILLAR.

No 6.
A woman made a disposition to her nephew, with power to alter in case of absolute and urgent necessity. She afterwards made a disposition in favour of another person, on a narrative that her nephew had disobliged her, though

HELEN MATHIESON being proprietor of some tenements and acres about Stirling, and having no children alive, she makes a disposition of her whole estate, both heritable and moveable, to James Millar writer in Edinburgh, her sister's son, in 1688, with a power to alter in case of urgent and absolute necessity. Some months before her death, in 1690, she was prevailed with to make a second disposition to one Renny, another nephew of her's, on a narrative that Millar had disobliged her by debauching her servant woman, and had straitened her in her living and credit, by inhibiting and arresting her effects; therefore she revoked his disposition, and gave a new one to David Millar, his brother, and Renny, betwixt them. Of this disposition James raised a reduction on these reasons, that it was elicited from the woman when old and infirm, and given *a non habente potestatem*, she having no power to alter, except in the case of extreme poverty allenarly; and he offered to prove she was so far from that con-