1725. *July* 31.

Dame Jean Skene, and Sir Alexander Forbes of Foveran, her Husband, for his Interest, *against* Elizabeth Skene, and George Skene, of that Ilk, her Husband, *&c.*

No 20.
Entail when presumed revoked.

Major George Skene, father to these competitors, purchased the estate of Carelston from the Trustees of Grantully, and took the disposition thereof to himself, and his heirs and assignees whatsoever. Thereafter he made an entail of the estate, in form of a disposition, in favour of his eldest daughter, Elizabeth, and the heirs of her body; which failing, to the other heirs substitute in the tailzie, assigning them to the procuratories in his right: And this deed he delivered sealed up, to a friend, with instructions that it should not be made public till his death.

Afterwards he expede a charter upon the procuratory in Grantully's disposition; and upon that charter to him, and his heirs and assignees whatsoever, he was infeft.

So soon as the Major died, the Lady Skene, his eldest daughter, proceeded to serve herself heir of entail; but her service was stopped, upon application by my Lady Forbes, who, as one of his heirs of line, took out brieves for a service, as heir-portioner upon the infeftment. And the dispute turned upon this point, Whether the taking the infeftment, upon the charter proceeding on Grantully's resignation to the Major, and his heirs whatsoever, (after executing the tailzie,) imported a revocation of the tailzie or destination of succession in favour of a limited line of heirs, and sent the succession again to heirs whatsoever.

It was *answered* for my Lady Forbes; That the Major had only a personal right by the original disposition; that the entail was likewise no more than a personal deed, completed as far as the nature of the thing would admit, by assigning the procuratories; and that it did not contain any clause restraining the Major's power of revoking or altering. From all which it was *argued*, That the subsequent formal feudal investiture, in favour of heirs whatsoever, was an alteration of the entail; for, since by the original conveyance to the Major upon his purchase, the lands were disponed to him and his heirs whatsoever, it was past doubt, that, if no subsequent deed had been done, the heirs general would have succeeded; and as the original destination was no otherwise altered than by this latent tailzie, which did not restrain the Major's power of revoking or altering, his after-resignation, in favour of his heirs general, and taking infeftment accordingly, was as formal an alteration of the entail, as the making of the entail was of the original destination; and, *de facto*, the right of the estate was vested in the heirs general; for the entail, which the Major might have completed in favour of the heirs therein named, could not now be effectual; because, the procuratories which stood assigned

to them were executed in favour of himself and his heirs whatsoever. 2*do*, It was *pleaded*, That the present case was quite different from that of a bond of tailzie, containing an obligation on the granter, not infeft, to resign in favour of a particular line of heirs of entail; in which case, should he afterwards take infeftment to himself and his heirs whatsoever, it might be construed as done in implement of the obligation in the bond of tailzie, and the heirs whatsoever would be obliged to enter and denude in favour of the heirs of entail: But, in this case, there was no obligation at all upon the Major, or his heirs general, to any sort of prestation; and no more was done to make the disposition in favour of the heirs of entail effectual, than the granting an assignation to the procuratories, with a design, no doubt, that the Major might complete the tailzie, if he was so minded: But since he actually withdrew those procuratories, and used them in favour of himself and his other heirs, it was plain that the alteration was, *de facto*, a revocation of the tailzie, the last settlement being quite inconsistent with it. No 20.

It was, on the other hand, *pleaded* for the Heirs of Entail; That the tailzie made by the Major, soon after his purchase, being a most deliberate settlement of his estate, no intention of his to alter it ought to be presumed, especially since the two methods only known in law, to make such an alteration, were so obvious and easy, viz. either to cancel the tailzie, or alter it by an express deed in writing.

That the procuratories used by the Major in the resignation which he made, were no new deeds, but such as did really subsist before his making the entail; which shows that his intention was not to alter it, but rather to make it valid, since he resigned, and took infeftment upon the very titles which were in his person before executing the tailzie. It was done, no doubt, to complete his own right in a feudal way, but could not be designed as an alteration of the anxious settlement by entail; for, had that been his intention, he would have cancelled the tailzie, which was still under his power, though deposited in the hand of a friend: That the Major having expressly appointed the depositation to continue till after his death, and that the entail should not be made public till that time, it appeared to be the same thing as if he had ordained it to be then delivered, and no sooner, and was equal to his delivery of the entail after infeftment had been taken to himself and his heirs whatsoever; and if this last had been the case, nobody could doubt but he intended that the entail should be effectual, as much as if it had been made after taking the infefiment: The Major, therefore, by such an act, showed that he meant no more by taking the infeftment than to complete the right in his own person, leaving the heirs whatsoever subject (as in law they were) to implement any disposition made by him, either before or after.

That the charter to the Major and his heirs whatsoever, might very well comprehend every person who could be heir to him, and, consequently, the heirs of tailzie, who, in virtue of his express will, were preferable to his heirs at

No 20. law, who plead their succession only in virtue of his implied will: And though heirs whatsoever, in the charter, do mean heirs of line, and would have carried the estate to them, in case no other deed had been executed by the Major, yet since he had formerly pointed out those whom he intended should succeed him in the estate, that estate must descend to these heirs.

That a disposition of one's estate to certain persons does sufficiently express the disponer's intention, that it should go to them; and, therefore, as necessarily imports an obligation upon his heirs at law to denude in favour of these persons, as a bond of tailzie would have done.

That the heirs of tailzie may be considered as the Major's assignees or disponees; and, therefore, must succeed preferably to his heirs at law, who are to be considered as much under an obligation to fulfil the Major's deed in their favour, as they would have been to make over the estate to any other person to whom the Major might have disponed it, without procuratory or precept.

The Lords found, that Major George Skene his expeding a charter, and taking infeftment thereon, after the tailzie, upon the procuratory in the disposition, conceived in favour of heirs or assignees whatsoever, prior to the tailzie, did not import a revocation or alteration of the said tailzie; and, therefore, repelled the objection proponed for Dame Jean Skene and her Husband.

Determined upon a hearing in presence.

Act. *Duncan Forbes Advocatus, & Jo. Forbes.* Alt. *Ro. Dundas.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 118. *Edgar, p.* 205.

No 21. 1732. *July* 7. Strachan *against* Farquharson.

Alexander Farquharson, in his latter-will and testament, appointed his wife executrix and universal legatrix of his hail goods, gear, moveable debts, sums of money, &c. At that time he was creditor in a bond for 2000 merks, payable to himself; and, failing of him by decease, to his only lawful son, John Farquharson, their heirs, executors, or assignees. The question occurred, Who had right to this bond; the wife, in virtue of her universal legacy, or the son, in virtue of the special destination in his favour?—The Lords found the universal legacy did not derogate from the special destination.—*See* Appendix.

Fol. Dic. v. 2. *p.* 133.

No 22. 1734. *July* 12. Lady Kinfauns *against* Mrs Lyon.

A Relict was provided, by her contract of marriage, to a share of the household plenishing. In a pursuit against her husband's Representatives, it