consent of all the parties-contractors in the marriage settlement. It was ANSWERED, that the Act 1685 related only to heirs of entail, and did not speak of the maker and institute; that it was absurd to say that a man could prohibit himself unless where some other person had an interest, as in the case of a contract of marriage, or mutual tailyie, where the heirs of the marriage and the heirs of entail have a direct interest, and *hoc agitur* to give them such an interest: that the prohibitory clauses of the entail in question were solely calculated for the benefit of Balnagowan, and without any consideration of the after heirs: that Balnagowan is not to be considered as another man who voluntarily tailyies his estate; he was in some measure forced to do it by the burthen of his debts, and adjected the prohibitive clauses only to secure the estate for the payment of his debts and daughter's provisions, and likewise to secure a redemption to the heirs-male of his body if he should have any: and, as to Francis Stuart, it cannot be supposed that he meant to come under any obligations to his own heirs-male, much less to the remoter heirs of entail, and it must be presumed that he would rather choose to have the estate in fee-simple; therefore in all such cases, where no third parties have any direct interest, a tailyie ought to be considered as an *ultima voluntas quæ est ambulatoria usque ad ultimum vitæ spiritum.* See Forbes, *23d June* 1713, *Scot* against *Scot.*

The general point was not determined; but it carried, that, all circumstances considered, the settlement 1685 might be altered.

N.B. Some of the Lords, who did not think that the maker and the institute could alter or alienate, were of opinion that they could transact, and that in this case there was *res dubia* and ground for a transaction, the settlement 1685 being liable to reduction on the head of imbecility and weakness in David Ross; and, besides, the estate of Balnagowan was, in the original rights, burdened with a clause of return to the heirs-male of the family of Ross.

N.B. President Craigie gave it as his opinion, in the case of *Lord Cromarty's Entail, 11th December* 1755, that this decision was to be defended upon the principle of the institute having repudiated, in which case the subsequent heirs cannot take, and the tailyie becomes destitute, like a Roman testament upon the repudiation of the heir; and he said it had been so decided in a case that came before the House of Peers.

1743. *November* 18. BINNING *against* EARL of LAUDERDALE.

[Elch., No. 18, *Tailyie.*]

JOHN Earl of Lauderdale tailyied his estate with strict irritant and resolutive clauses *de non alienando et non contrahendo,* and under several limitations and conditions, particularly, that the heir should ratify all the deeds granted by the Earl in favours of his lady or her son, before he could enter; that he should be bound to pay all the Earl's debts then due, and all that he should

afterwards contract, even legacies left *in articulo mortis;* and there is a faculty granted to the heirs of entail, whereby they are empowered "to contract or take on the sum of £40,000 for performing their honourable affairs." Richard, the first heir of entail, did not enter, but contracted debts upon which he was charged to enter, and the estate adjudged. *Quær.* Could the adjudication be sustained to the extent of the faculty? It was objected to it, 1*mo*, That, as the heir in this case was bound to certain conditions and prestations, he could not properly be charged to enter heir, unless he could be charged at the same time to perform the conditions of the entail, which is impossible. 2*do*, It cannot be presumed to have been the will of the maker of the entail that any of the heirs should have this faculty of contracting £40,000, who did not enter and represent him. ANSWERED,—1*mo*, That the Act of Parliament 1621, allowing charges to enter at the instance of the creditors of the heir, speaks in general of heirs, and is not confined to heirs in fee-simple; that all heirs charged to enter, and not entering, are esteemed, *præsumptione juris et de jure*, to lie fraudfully out, and therefore are held, *fictione juris*, as if they were entered. 2*do*, It cannot be thought that it was the intention of the maker of the entail that his apparent heir should be taken and laid in jail, possibly when he had a mind to enter, but before it was convenient for him to do it; and this would be the case if it were law that he could not be charged to enter heir *cum effectu*.

The Lords found that the adjudication was valid.—*Dissent. Preside.* Actor, Harry Hume.

1743. *November* 23. GEDDIE *against* SOMERVILLE.

[Elch., No. 16, *Deathbed.*]

THE Lords found that a man might give to his wife, (or to any other,) a faculty to dispone his heritage *etiam in articulo mortis*, and that the grant of such a faculty *in liege poustie* did not fall under the law of deathbed, though the faculty was exercised on deathbed. If the words had been "at any time during her life," the decision would have been the same; but it is presumed the decision would have been different if the husband had, instead of the faculty, given the property of the subject to his wife, with a power to dispone on deathbed, since that would be a power to frustrate her own heirs, contrary to the public law; whereas in the present case she had only a power to take the estate from the heirs of her husband, which he might grant *in liege poustie*.—Actor, William Grant.

The question, where the fee was, whether in the husband or wife, was here very learnedly debated.—See the papers.