granted by him to his other lands and estates." Margaret Laurie, a remoter heir of entail, brought an action against the immediate heir, James Laurie, to oblige him to make up titles to the said disposition, and to insert in his right all the provisions, restrictions, clauses irritant and resolutive, contained in the tailyie referred to in the disposition.

The Lords found, That, by the word *Restriction*, was meant all the restrictions of the tailyie referred to, or the right so restricted, as in the former settlement; and they seemed to be of opinion, that if the heir made up his titles otherwise than as he was required, there might be room for a declarator of irritancy against him, upon the statute 1685; but they found, that, where there was no bond of tailyie, but only a simple disposition of tailyie, as in this case, the remoter heir of entail had no action against the immediate, to oblige him to make up his titles at all, or to make them up in any other form than he inclines; because every man is at liberty to make use of every right in his person, and if the immediate heir thinks he can get at the estate in any other way, he may try it, still with the risk of encountering the statutory irritancy, by which, as the evasion is punished, so at the same time it is not prohibited.

It was said, on the other side, that the remoter heir of entail was considered by our law as having an interest in the entail, and therefore he has an action against the immediate heir for exhibition and registration of the entail; and if in this case an action is refused, there is a way opened to destroy every entail, for the heir may enter without taking notice of the irritant and resolutive clauses, and then sell the estate; and, by the Act 1685, the purchaser is safe.

Notwithstanding, the Lords found that in this case action did not lie.

1744. *July* 3. AGNES MURRAY *against* CREDITORS of HUGH MURRAY.

[Elch., No. 26, *Tailyie;* Kilk., No. 5, *ibid.;* C. Home, No. 269.]

THE Lords found unanimously that the debts of the institute of an entail were valid to affect the estate, whose sasine had not the provisions and limitations *verbatim* engrossed in it, but only a general reference to the provisions, limitations, clauses irritant, &c. contained in the bond of tailyie, "and which are hereby holden as repeated *brevitatis causa*." The precept whereon this sasine was taken, bore likewise only a general reference to the provisions, &c. above mentioned, but the Lords would not have sustained the debts upon that account only, because the precept was part of the deed of entail, and whatever is engrossed in any part of a deed is held to be in every part of it; but the instrument of sasine is a distinct writing by itself. In this case it was debated, but not decided, whether the debts of the tailyier, or any other debts affecting the estate, which were paid by the heir of entail, could be reared up against the estate, and affected by the creditors of the heir as a separate estate in his person. Two cases were put; one, when the heir making payment had only taken discharges of the debts; the other when he had taken assignations to the debts he paid, either in his own name or in the name of a trustee.

It was argued that the debts are extinguished: 1*mo*, Because an heir of entail, though limited in the representation, like an heir of inventary, is still

an heir as far as his representation goes, and therefore personally liable to pay such debts of his predecessor as affect the estate; and if he pays them, whether he takes discharges or assignations, as he is both debtor and creditor, they must be extinguished.

2do, In this case there is an express obligation to purge within a limited time, any diligences that shall be led against the estate for the tailyier's, or any other debts affecting it; so that, if the debts had been secured by adjudication, there would have been no doubt but the heir of entail would have been bound to pay them; and it will make no odds that he has voluntarily paid them without abiding diligence. In the year 1736 it was decided, in the case betwixt *The Creditors of Durris and The Earl of Peterborough*, mentioned in the Dictionary under the title *Consolidation*, that a wadset right upon the entailed estate, prior to the entail, purchased by the heir of entail, and an assignation taken to it, was not extinguished *confusione*, but subsisted as a separate estate in his person, affectable by his creditors, though by the entail he was bound to pay the debts of the tailyier, and consequently the wadset sum, if required. It is to be noticed that the wadsetter in this case was publicly infeft, so that the tailyier had not the superiority of the lands, nor any other right in his person except the right of reversion.

The Lords found that the tailyied estate was affectable by the creditors of the heir purchasing the wadset, to the extent of the redemption-money.

The arguments in this case run pretty much upon this general position, how far two rights being extinguished and sopite, *confusione*, in the person of the heir of entail, can revive again and divide in different descents and successions; *e. g.* suppose an heir of entail of a superiority should purchase in the property, would the property in that case be so consolidated with the superiority that they would both be affected by the entail, and would not divide in the succession of the heir, nor be affectable by his creditors? This was decided in the case of *The Duke of Queensberry* against *Heron*, in the 1734 or 1735, where the Lords found that the property in such case was not affected by the entail, though it was consolidated with the superiority by a resignation *ad remanentiam*, which was the way in which the heir purchasing chose to make up his right. Another example: Suppose an heir of entail bound to pay all the tailyier's debts and relieve his heir of line, and suppose the same man becomes heir of line and heir of entail; *Quær.*, Will the obligation of relief, which for a time is extinguished *confusione*, revive again when the succession comes to divide betwixt the heir of line and heir of entail? This, too, the Lords have determined in the affirmative, *21st December* 1680, *Lady Margaret Cunningham* against *Lady Cardross*; which I think comes very near the present case of Agnes Murray.

1744. *December* 12. ROBERTSON *against* SHAW.

IT was allowed, in this case, that a servitude of thirlage to the mill of a barony, may be constituted by the tenants of the barony constantly coming to the mill and paying insucken multure for the space of forty years. This seems to come something near the principle established in the decision, *July* 17, 1629,