remainder-man, and insisted to have his remainder sustained, at least reserved. We dismissed George M'Kenzie's claim; and found that we could not judge of the right of the remoter substitutes, for whom no claim was presented in their names, reserving to them to be heard when the succession should open to them; though we thought even then the Parliament alone could relieve them. *Vide* the interlocutor subjoined to the claim.

No. 45. 1751, Dec. 19. WALTER SCOTT *against* HEIRS OF TAILZIE.

SIR WILLIAM SCOTT of Harden in 1705 tailzied his estate, but gave power to the heirs of tailzie to sell part of the estate with consent of the persons named, and after their death of the next three heirs of entail, and in case of the succession's devolving to heirs who should have estates of their own, he obliged them to tailzie their estates in the same strict manner, and add them to his estate with the same conditions, provisions, &c. In 1734 the estate devolved to the deceased Walter Scott of Hychester, who agreeably to Harden's tailzie, made a strict entail of his own estate with the burden of the debts he then had, whereof he made up a list of L.6100 sterling, besides bairns provisions, which were then very small, and gave the like power to his heirs to sell part of his estate, with consent of the three next heirs, for payment thereof. His son Walter has now succeeded, and pursued declarator against the heirs of entail, of his powers to sell part of both estates for payment of the respective debts affecting them, with consent as in the tailzie; and for ascertaining the extent of Harden's debts when his father succeeded in 1734, and of the father's debts at that time, and at the time of his death. At first some of the heirs of tailzie made opposition, but afterwards dropt it; and the Ordinary in the Outer-House pronounced an act for proving the rental and value of the lands to be sold, and the extent of the debts at these periods; and particularly for the creditors deponing that they were still subsisting, which was done, and came this day to be advised in presence. The debts on Harden were in 1734 about L.2100, and he only insisted that he could sell of the old Harden estate to that extent. He proved his father's debts in 1734, whereof the father had subscribed a list, and he also proved his personal estate at that time, and the balance was L.4999 sterling of debt. He also proved that his debts were at his death L.9414, but his personal estate was then L.4580, so the balance was only L.4834, which was less than the balance in 1734, when he succeeded, and therefore the pursuer insisted that he had power to sell to that extent of the Hychester estate. The President thought the process not competent, for that it was a consultation rather than a process; but in that the Court differed from him; and as this might be the subject of a question with the remote heirs many years hence, when a proof of the subsisting debts might be difficult, we thought it very competent to ascertain them by a declarator, as well as the rent and value of the lands to be sold, and mentioned other methods of doing the same thing; as particularly by a sale of a part of the lands, and the purchaser suspending the price, which was the case betwixt the Earl of Hopetoun and Hepburn of Keith, on which they got the judgment both of this Court and of the House of Lords; or by one of the remote heirs of tailzie endeavouring to inhibit him on the tailzie, and his opposing it on the faculty to sell. But there was another question of greater importance and delicacy. The last Walter Scott had paid and totally extinguished sundry

of his own debts, contained in his list 1734; and the reason of the balances being so large at his death, was by giving large provisions to five younger children of L.5000 sterling; and the question suggested by the President was, Whether an heir of entail paying and extinguishing part of the debts upon the entailed estate, becomes thereby creditor to that estate, so that by gratuitous bonds of provision, or even by contracting onerous debts, he can again charge the estate with debt to the same extent, and he was clear of opinion that he could not. I was also of the same opinion. I thought an heir of entail was not bound to apply his personal estate in payment of the debts of the entail, and therefore might, if he was pushed by the creditors, take assignments in name of a trustee, and then they would be still subsisting debts, but that if he once extinguish them, he could not again rear them up, and if the law was otherwise, the debts on an entailed estate, however they might grow by not-payment of interest during an unfrugal heir's possession, yet could never grow less, for if a frugal heir paid any debts, he thereby became creditor to that extent on the estate, which must descend to his heirs, especially if his heirs-at-law and of entail were the same; and I thought this was a case very different from that of Pulrossie, where the debts on the entail were in reality never diminished, but money borrowed from one creditor to pay another, though the tailzier's bonds were not extant, and to cut out these new creditors would have been sanctioning a fraud, and yet more different from the case of the Duke of Queensberry, who purchased a feu whereof the superiority only was entailed, and took a resignation *ad remanentiam*; and from that of Sir Peter Fraser of Durris's creditors, who had redeemed a wadset and paid adjudications affecting the entailed estate, but were not debts of his or of the tailzier's. However, it carried by a great majority that he might sell lands to the extent demanded.

No. 46. 1752, July 1. SIR KENNETH, &c. M'KENZIE *against* STEWART.

LORD ROYSTON, of consent of these two pursuers, his nephews, obtained an act of Parliament for sale of Royston, with power to the trustees, therein named, to apply the price for payment of the expense of the act, and for payment of two great debts therein mentioned, and to get them conveyed to the purchaser. Sir Kenneth and Gerard M'Kenzie now pursue John Stewart, Royston's grandson and heir of line, to account for the price to them as next heirs of entail. Answered, the price exhausted by those debts. Replied, they were fictitious debts, and before extinguished. But we found we could not enquire into the matter, or review the act of Parliament, and therefore assoilzied. Reversed in Parliament 14th March 1754.

(The import of the Lord Chancellor's speech, referred to by Lord Elchies as stated on his copy of the appeal case, (not preserved) is given by Lord Kames in his report of the same case, DICT. No. 164, p. 7445. The report as in the Fac. Col. is DICT. No. 65. p. 15,459.)

No. 47. 1752, July 1. CLAIM OF MERCER ON THE ESTATE OF LETHINDIE.

IN 1732 Sir Lawrence Mercer made a strict entail of his estate of Lethindie, in favours of himself and heirs-male of his then marriage, and heirs of their bodies, whom failing to the heirs-male of his body of any other marriage, and heirs of their bodies, whom failing to