precept went out of the Chancery in terms thereof, and the sasine given at the place of Balfour. Now Mr Bethune prays the Court to supply this defect, and to order the Director of the Chancery to issue new precepts, which I reported, and the Lords would not amend the retour, that is, would not order precepts to be issued, containing the dispensation for taking infeftment at the house of Kilrennie, because that was not in the retour. But as that dispensation did not hinder the taking infeftments on the ground of the several tenants, therefore we granted warrant to issue precepts with that quality, that the precepts direct the Sheriffs to give infeftment on the grounds of all the several lands.

No. 3. 1753, July 13. MISS K. MAITLAND *against* MAJOR A. FORBES.

IN 1700 Sir Charles Maitland of Pittrichie executed a procuratory of resignation for resigning the estate in favours of his son Charles and heirs-male of his body, and the heirs-male of their bodies, which failing to the other heirs-male to be procreate of his own body and heirs-male of their bodies, which failing to the heir-female to be procreate of his sons body and heirs-male of their bodies, the eldest daughter or heir-female always succeeding without division, which failing to Jean Maitland and heirs-male to be procreate of her body, which failing to Mary his second daughter and heirs male of her body, and then to the rest of his daughters and heirs-male of their bodies *seriatim*, which failing to his heirs-male whatsoever, and heirs-male of their bodies, which failing to his own nearest heirs and assignees whatsoever; but reserving powers to himself equal to a property, *proviso* that if the succession should devolve to daughters or heirs-female, the eldest daughter or heir-female should succeed without division and marry a gentleman of the name of Maitland and bear the arms of Pittrichie; or if they married a gentleman of another name, that the said heirs-female and their husbands and their heirs should assume the name of Maitland and bear the arms of Pittrichie, and in case of contravention the said heirs-female and their husbands, and the heirs of their bodies, shall amit all right to the said estate, &c. *proviso* also that it shall not be lawful to any of the daughters or heirs-female who shall happen to succeed to sell, annailzie, or dispone the same or any part thereof, nor to wadset or impignorate the same, nor to burden or affect the same with any sum of money, above the sum of 20,000 merks, and if once burdened with that sum, the subsequent heirs-female are to have no power to burden the same with any more, and if the estate shall be adjudged for the said 20000 merks, the said heirs who are then in possession of the estate shall be obliged to redeem the same two years before expiration of the legal, and an irritancy was added in case of contravention. Sir Charles the father died and was succeeded by Sir Charles the son, (who married the Lady afterwards married to Pittodrie) and in 1703 he ratified the former tailzie and added more lands, and in 1703 expede a charter on his father's and his own procuratories, but died before infeftment taken on it, and was succeeded by his sister Jean, (who was married to Mr Alexander Arbuthnot, afterwards Baron Maitland) and she expede a general service as heir of tailzie to her brother, the retour bearing, "Quod quondam dominus Carolus Maitland de Pittrichie frater germanus magistri Joannis Maitland, filii natu maximi mortui domini Caroli Maitland de Pittrichie melitis Baronetti Obiit, &c.; et quod dicta magistra Joanna Maitland est legitima et propinquior hæres talliæ dicti quondam domini Caroli Maitland

sui fratris germani," &c. but without saying what tailzie or of what lands; and by virtue of this service took infeftment on her brother's charter 1703; and on her death her son Mr Charles Maitland, advocate, was in 1747 served heir in special to her, and infeft, and that same year executed a procuratory of resignation altering the succession and preferring his two sisters Katharine and Mary *seriatim* and heirs of their bodies, and after them only called Major Forbes the son of his aunt Mary, and the other substitutes in the entail 1700, and left his sisters unlimited, but limited the Major with new limitations not contained in that entail; and on his death his sister Katharine entered to possession of the estate. Major Forbes took out first a brieve to serve heir of tailzie to Mr Charles Maitland, and was opposed by Mrs Katharine on Mr Charles's procuratory preferring her. Both parties repeated mutual declarators and agreed to have the point of right decided. Then Major Forbes was advised that the mother's service was insufficient to transmit the procuratories 1700 and 1703, and charter thereon, and therefore took out new brieves to be served heir of entail to his uncle young Sir Charles. After being debated before the macers and assessors, the case was reported to us on informations, and was thereafter argued in presence four days, and reported by me from the chair, Tuesday and Thursday the 10th and 12th instant. The first point advised was the objection to the mother's service, that she was only in general served heir of tailzie to her brother, but did not mention what tailzie nor of what lands, and therefore it did not appear by the retour that she was heir of this tailzie; which occasioned a long litigation whether a retour could convey a tailzie without reciting it either by the date or the lands; and volumes of printed excerpts were laid before us from the Chancery on both sides of the question. 2dly, The defender, *i. e.* Mrs Maitland, produced an extract from the Bailie-Court at Aberdeen of the service to prove that the tailzie had been produced before the inquest. The defender pleaded also prescription on three different statutes, first the 20 years prescription of reduction of retours; 2dly the act 1594 dispensing with procuratories and instruments of resignation and precepts of sasine after 40 years possession; 3dly the positive prescription on the act 1617. There were different opinions on the Bench too numerous to be marked. My notion of the question was, that in order to transmit a personal deed by a retour, it is necessary that the retour instruct not only that the granter or last fiar is dead, and the raiser of the brieve or claimant called to the succession, but that all the heirs called before him have failed; that if it instructs these points, it will transmit the deed though not at all mentioned in it; but if it does not instruct these points, it will not carry that deed, and cannot be supplied by any extrinsic evidence. And as retours are the only method devised in law to vest personal rights in heirs, I thought that rule ought to be strictly observed, otherwise it may depend upon evidence extrinsic from the deed to be transmitted and the retour, or even on parole evidence, that a person died last vested in any particular deed. That if the deed is described by the date or otherwise in the retour, that answers the whole the same way as in a special service, for saying one is *propinquior hæres* of such a deed imports that all the persons called before him have failed. But the same thing may be done without describing the deed, as a service as heir of line or heir-male gives right to every deed devised first to those heirs. Yet a service as heir-male will not give right to a deed devised to the heirs-male of the granter's body, whom failing to the heirs-female of his body, whom failing to his nearest heirs-male, because the retour does not

verify that the heirs-female of his body have failed; and yet a service of a son *suo patri* would carry it, and so also would a service of a daughter as *propinquior hæres suo patri*, because that would verify that there were no heirs-male of his body; and this was the ground of our decision in the case of Edgar against Barncleugh 21st July 1738, (*voce* SERVICE OF HEIRS) where a provision to the heirs-male of a marriage, which failing the heirs-male of any other marriage, which failing to the heirs-female of the marriage was found not carried by a retour of the son as *propinquior hæres suo patri*, though he was truly heir of that provision, being of a subsequent marriage, and the heirs-male of that marriage had failed, because notwithstanding the retour there might have been heirs-male of that marriage, and he might have been of a former marriage and thereby *propinquior hæres patri*, though it was notorious that that was the contract of the first marriage, and that there were no heirs-male of that marriage, for it was the heir-female of the marriage that was competing and was preferred to the gratuitous disponee of the son of the second marriage that had been so served; but the Court thought that no extrinsic evidence could be admitted that was not in the retour. And in this case had Jean Maitland been served *propinquior hæres* both of her father and brother, I thought it would have carried this tailzie, because it would have proved that all the heirs-male of the father's body and all their issue, and all the issue of their brother's body had failed. But for any thing that was said in the retour the father might have had other sons or grand children by them, and the brother might have had daughters and possibly sons too, and though she was served heir of tailzie, yet *non constat* of what tailzie; the brother might have had other tailzies of lands or sums of money; and supposing that in fact there was no other tailzie, which we at this distance cannot know, yet that does not appear from the retour. And as to prescriptions I thought none of them applied,—not the 20 years prescription, for the retour is not quarrelled, only it does not transmit the right, but may perhaps have transmitted some other tailzie,—not the act 1594, neither in the words nor spirit of the law, no more than if a person as pretending to be assignee by young Sir Charles had infeft himself on the charter could be exeemed from producing his assignation,—besides that the act does not apply where the writing is produced,—and not the act 1617, for that requires charter and sasine in the defender's person, and the defender here has indeed a sasine but no charter, and the sasine has no warrant because the retour did not give right to the charter. Upon the question it carried to repel the objection to the retour, *renit. tantum* Kilkerran *et me*. Some were of that opinion, because of the 40 years prescription, others because of the excerpts, which I thought signified nothing in this question, and that so far as appeared to me, there was scarce any of them that might not be sufficient for the purpose for which they were expede, because they generally expressed the relation, or retoured them heirs-male or of line as well as tailzie or both to verify that the preceding heirs called had failed.

As to the other brieve, the pursuer or claimant founded on the prohibition to sell or contract debt expressly laid on the daughters or heirs female. Answered, Mr Charles Maitland was not called to the succession as heir-female, but as the heir-male of Jean's body, that by daughters or heirs-female the tailzie meant only female-heirs, as appeared by the preceding clause obliging the eldest daughter or heir-female to marry a gentleman of the name of Maitland, and that Charles Maitland might have succeeded even when

he was not heir-female, that is, nearest heir of line to the testator, because all the heirs-female of the sons body are not called, but the heirs-female of his body, and the heirs-male of their bodies, so that the heirs-female of their bodies are passed over, and a man cannot have more than one heir-female, excepting the case of heirs-portioners. Replied, heirs-female in the proper law signification comprehends all males as well as females connected to the tailzier by females; and though in the destination he very properly called heirs-male of his daughters bodies, since he did not intend that the heirs-female should succeed, yet these males were heirs-female to him, and though in the preceding clause, about marrying husbands, heirs-female must be understood, *secundum subjectam materiam*, only of daughters, yet there is no reason for limiting it so in the clause in question; and even the preceding clause obliges the heirs of the daughters bodies to bear his name and arms under an irritancy, which was impossible if they could arbitrarily alter the succession; and the clause substituting the heirs-female of his son's body included all his descendants, but with a preference to the male issue of his heirs-female who should succeed, so that Mr Charles could not succeed till he was also nearest heir of line. But though it were otherwise, a man may have an heir-female of tailzie or provision who is not his heir of line. The defender answered 2dly, that though Charles Maitland were included in in the prohibition to sell or contract debt, yet that would not imply a prohibition to alter the succession, for it is a settled point even by judgments of the last resort, that a prohibition to contract debt does not imply a prohibition to sell nor *vice versa*, and it is plain that a prohibition to alter the succession does not imply a prohibition either to sell or contract debt, whereof neither will this last imply a prohibition to alter. Replied, 1st, Altering the succession is truly an alienation from the heirs, which was the only thing meant by the clause to be restrained. 2dly, An heir cannot be limited from selling or contracting debt if he can arbitrarily alter the succession.

On both questions I gave my opinion, that here the only question was, whether Mr Charles could gratuitously alter the succession; but not concerning any irritancy; that if the question were touching any irritancy, I would be very doubtful of inferring a forfeiture by implication, where it was not imposed by express words. But implied prohibitions to alter the succession was a thing very common in our law; that that was the case of destinations in contracts of marriage to the heirs of the marriage, of proper clauses of return, and of mutual tailzies, or other onerous tailzies; in all which the presumed will of the tailzier implied a prohibition to alter, though none was expressed, and the law gave it the force of an express prohibition, though not of an irritancy. Therefore when the tailzier's will is clear and evident that the heirs should not alter the succession, the law is the same. That it was impossible to limit the heir in any thing under an irritancy, if he can at pleasure alter the succession, because if he has the free choice of his heirs, he is bound to nobody, and nobody can quarrel his contravention or any thing he does; and in this all the lawyers treating *de prohibita rerum alienatione*, that I have seen, agree; and such is our law; for in the strictest entail, when the succession comes to heirs whatsoever, all the limitations fly off, and therefore when one obliges his heirs either to assume his name, or not to sell, or not to contract debt under an irritancy, there cannot be a question, that he meant that the heirs so limited should not have it in their

power to alter the succession, because if they can, those limitations must go for nothing. That the case is quite different as to limitations not to sell or not to contract debt; the tailzier may limit him as to the one, when he did not intend to limit him as to the other, and his limitation as to the one will be effectual without the other,—and he may also limit him from altering the succession, without intending to limit him from onerous sales, or from contracting debts,—and his will is effectual, and therefore the one does not necessarily imply the other; but he can neither will to limit him to any thing under an irritancy, without willing the succession to stand unalterable, nor could such will if it could be supposed be effectual, and therefore no argument can be drawn from the cases quoted to this case. And there is also another difference: A prohibition to sell or contract debt can have no effect without an irritancy both of the acts of contravention and the contravener's right, for the Court has justly found that an irritancy of the acts of contravention can have no effect, if the contravener's own right still subsist, and the law is unwilling to inflict forfeitures by implication. But that is not the case of prohibitions to alter the succession. These are effectual against gratuitous deeds, without any irritancy or forfeiture of the contravener's right, and therefore often implied from the presumed will of the tailzier, without presuming that he thereby meant to limit him from selling or contracting debt under an irritancy;—and therefore the limitation on the issue of Jean Maitland to assume his name and arms under an irritancy which is express, is to me undoubted evidence of his will that they should not alter the succession. 2dly, I think they are included in the prohibition to sell annalzie or contract debt under the general words "heirs-female," for the reasons above mentioned. And I think also that Mr Charles Maitland was not called to the succession, while there was any issue of his uncle Sir Charles, and consequently not till he was one of the heirs of line, and that the heirs-female of young Sir Charles's body cannot in that clause be confined to his daughters, for if it had descended in the male line for two or three generations, and then the grandson or great-grandson of young Sir Charles had left a daughter, I thought she would have been preferred to Jean his grand-aunt, or great grand-aunt, and her issue; but supposing it were construed otherwise, I thought that a man may not only have different heirs-female, (besides the case of heirs-portioners) that is, may have heirs-female of tailzie or provision, and who in law have that designation, but may also have different heirs-male, the one the heir-general, and the rest heirs-male of tailzie or provision, as happens every day in heirs of different marriages, and provisions made to the heirs-male, which failing, the heirs-female of these respective marriages, and who must all of them severally be served heirs-male to the father, as procreate betwixt him and such a woman. So if a man marrying an heiress tailzies his own estate to the second son of the marriage, and heirs-male or heirs of his body, these heirs-male are all heirs-male of tailzie or provision of the tailzier, though not general heirs-male: So in this case Mr Charles Maitland being connected to the tailzie by a female, he was with great propriety his heir-female on that subject, though there could have been a nearer heir-female or of line existing of the son's body. And if he was limited not to sell or contract debt, no doubt could remain with me of the implied prohibition to alter the succession. The Lords found that Mr Charles could not gratuitously alter the succession, and decerned and declared accordingly, and

therefore allowed Major Forbes's service to proceed; *renitentibus* Minto, Justice-Clerk, and *maxime* Drummore. 9th August Adhered, to the last part of the interlocutor, the first not being reclaimed against.

*** As I intend these Notes only for my son's use, I have been the more full in this case, because the reasoning may be of general use to him.

RUNRIDGE.

No. 1. 1748, June 2. DAVIDSON *against* KERR.

THESE two heritors had some lands runrigg, and others possessed as commonty, and both willing to denude, but could not agree in the plan. Kerr pursued a division before the Sheriff, but Davidson offered a bill of advocation, because though by the 23d act 1695, the Sheriff may divide runrigg, yet by the 38th act 1695, the power of dividing commonties is only committed to the Court of Session. Haining refused the advocation; but on a reclaiming bill, we remitted to him to pass it; but resolved when it came in with a new summons of division that Davidson has raised, to remit to the Sheriff as usual to make the division; but to be reported to us.

SALE.

No. 1. 1735, Dec. 12. SMITH *against* BROWN.

A PARCEL of sheep, sold at 100 merks the score, under condition that they should not be sold to one Wellwood, or brought back to Scotland, otherwise the price to be L.100 the score,—the Lords found the paction binding, 7th November 1735.

December 12, The Lords were unanimous in adhering to the interlocutor pronounced 7th November, (and signed the 8th) finding the bargain lawful, but were not unanimous that the sheep sold were for Wellwood's behoof. Several were for examining Scot and Palmer, *(inter quos ego)* but by the majority the interlocutor was adhered to as to that point likewise.

No. 2. 1735, Dec. 12. GOVERNOR OF WATSON'S HOSPITAL *against* THE CREDITORS OF MERCHIESTON.

THE Lords adhered, and ordained the annualrents to be paid in, but remitted to the Ordinary to see the money laid out, that the money may not lie dead.