

this to be the case when the condition is not implied but expressed. As to the maxim, *qui semel hæres semper hæres*, it did not obtain in our law ; for, besides the examples above given of fiduciary fees, there is, in the case of the Act 1700, commonly called the Popish Act,—first, a Papist who succeeds if he be under the age of fifteen ; then, if after that age he does not renounce Popery, he ceases to be heir, and the Protestant heir succeeds ; and thereafter again, if within ten years the Popish heir abjures Popery, the Protestant heir ceases to be heir, and the Papist succeeds. And with the President all the rest of the Lords agreed. Some of the Lords made a distinction betwixt the succession *ab intestato* and the tailyed succession ; but others, particularly Prestongrange, made none. They had no occasion to determine whether the debts of the fiduciary heir affected the estate ; but the President gave it as his opinion, and with him a great majority of the Lords seemed to agree, that they would not ; because the fee, being of its nature temporary and resolvable, could not be affected with any burthens to continue after it was resolved and at an end ; no more than wadset lands or excambed lands could be burthened with debts, to remain after the wadset is redeemed, or the lands given in exchange for the excambed lands evicted.

---

1756. June 24. SIR KENNETH M'KENZIE *against* STEWART of FARNESE.

IN the year 1688, George, Viscount of Tarbert, afterwards Earl of Cromarty, made a tailyie of his estate, with prohibitive, irritant, and resolute clauses, in favour of himself in liferent, and his third son, Lord Royston, in fee, and other heirs substituted, not necessary to be mentioned ; and upon this deed of tailyie a charter was expeded and sasine taken, and the charter recorded in the Register of Tailyies ; and at this time Lord Royston was sixteen years of age. In the year 1707, the Earl of Cromarty, and his son, Lord Royston, wanting to get free of this entail, fell upon the following device : Lord Royston disposed the estate to the Earl, and he disposed it back again to his son, my Lord Royston,—to him, his heirs and executors, without any limitation or restriction : and upon this disposition infetment followed ; and thereafter, in the year 1714, the Viscount of Tarbert, and his son, my Lord Royston, executed a formal revocation of the tailyie 1688.

In the year 1739 my Lord Royston made an application to Parliament, setting forth the facts above stated, concerning the making of the entail in the year 1688, and the attempts to alter it in the year 1707 and the year 1714 ; and also that the estate was burthened with debts of the tailyier to a certain extent ; and therefore craving leave to sell the estate for payment of these debts ; the residue of the price, if any, was to be settled upon the heirs of the entail. Upon which petition an Act of Parliament was passed, allowing the estate to be sold, by certain trustees therein named, for payment of certain sums to certain creditors therein named, and the residue of the price to be settled, in terms of the entail, upon the heirs of entail : This Act of Parliament was obtained by my Lord Royston, in concurrence with the heirs of entail then in life, and was pro-

cured in consequence of a bargain for the sale of the estate, which Lord Royston had then made with the Duke of Argyle, for the price of L.7000. The debts mentioned in the Act of Parliament did more than exhaust the price of the estate; notwithstanding which, Lord Royston granted a bond to Sir George M'Kenzie, the next heir of entail, for the sum of L.1000, proceeding upon the narrative of pure love and favour; but, this notwithstanding, the next heir of entail, the present Sir Kenneth M'Kenzie, brought an action against Stewart of Farnese, Lord Royston's heir-at-law, to have it found and declared that the debts mentioned in the Act of Parliament were fictitious debts; and therefore that the defender, Mr Stewart, must account for the price of the estate.

To which it was ANSWERED,—That, by the Act of Parliament, the extent of the debts upon the estate of Royston was settled, and could not now be called in question,—and the Lords so found; but the decree was reversed by the House of Peers, who found that, notwithstanding of the Act of Parliament, no other debts could affect the estate but such as were proved to be really due.

Mr Stewart, being in this manner beat out of this defence, betook himself to another, namely, that the estate of Royston was not entailed, but was possessed by my Lord Royston in fee-simple, and, consequently, that Lord Royston, or his heirs, were not obliged to account to the pursuers for the price.

To this plea two answers were made,—*1mo*, That the defence is not competent, in respect that the Act of Parliament supposed the estate to be entailed, and enacted that the residue of the price, after payment of the debts, should be settled upon the heirs of entail. *2do*, That the estate being once entailed by the settlement executed in the year 1688, it could not be altered by what was done in the year 1707 or 1714. As to the first of these points, it carried, by a majority of seven to six, *dissent*. Kaimes, Prestongrange, and Auchinleck, that the defence was competent notwithstanding of the Act of Parliament, which did not enact that there were debts to such an extent as the House of Peers had found; and for the same reason did not enact that there was a tailie, but proceeded upon the supposition that there were both, which supposition might be redargued in the one case as well as the other; and the order in the Act, to apply the residue for the behoof of the heirs of entail, was no more binding than that part of the Act which enacted that the price should be applied for payment of certain creditors. This interlocutor altered, February 14, 1757.

As to the other point, the PRESIDENT said, that he had always dissuaded deeds of tailie of this kind, by which the liferent was only left in the maker of the entail and the fee settled upon the first institute, because it was in the power of such first institute to evacuate the entail altogether, by repudiating the succession after the death of the tailyier, as was solemnly decided in the case of *Hamilton of Orbiston*, where, although the deed of entail was never executed by infestment, yet he thought the reason of the decision would apply equally to this case: he had therefore always advised his clients to make themselves the first institutes, in their own entails, and the rest only heirs of entail,—so that, if the first substitute should repudiate, the entail might notwithstanding be valid; whereas, in the other case, by the repudiation of the first institute, the entail is utterly void and null, and the right reverts to where it was before;—that is, to the person of the disposer. The question therefore, in this case is, Whether Lord Royston accepted or repudiated the tailie in the year 1688?—

and he confessed that the rule of law was, that any right taken in favour of infants, absents and ignorants, was presumed to be accepted by them; and in this case, if Lord Royston had died without doing any deed repudiating the entail, he would have been deemed to have accepted of it; but he plainly showed his intention to repudiate it and to accept of his more beneficial right, which his father intended for him,—first, by the transaction in the year 1707; then by the revocation in the year 1714; and lastly, by his continuing to possess the estate after his father's death, upon the more beneficial title, as must be supposed,—that is, upon the infestment 1707; nor could his after application to Parliament, upon the supposition that there was an entail, be any argument of a contrary intention; because the only design of that application was, in the first place, to secure the purchaser, and, in the second place, to secure himself against incurring any irritancy. And this point, the President said, was precisely determined in the case of *Balnagowan*, in 1744, where it was found that the first institute, Mr Francis Stewart, not having accepted of the settlement, could repudiate it by making, with the consent of the tailyier, a new settlement in favour of my Lord Ross; and, in general, he said, it was absurd to maintain that a settlement made upon a man under certain conditions and limitations, though completed by infestment, could not be repudiated, or was a valid settlement, until accepted by the party, who, in many cases might have very good reason to reject it; for, suppose that the condition of it was that he should bear the name and arms of a certain family, when he was obliged to bear the name and arms of another family, under penalty of losing a greater estate. This, he said, actually happened in the case of *Sir Hugh Dalrymple*, who was obliged to repudiate solemnly the estate of Bargeny, and by that means made room for his brother, who presently possesses it: nevertheless the contrary opinion prevailed; and it was found, by a narrow majority, that Lord Royston had not repudiated but accepted of the entail 1688. *Non liquet*, Kaimes, Prestongrange, and Justice-Clerk.

This interlocutor adhered to almost unanimously, and the application to Parliament thought an acceptance of the tailyie.

---

1756. June 29. JOHN CAMERON *against* MISS MALCOLM.

[Kaimes, No. 109.]

THE LORDS in this case reduced a marriage, on account that the woman was but twelve years and four months old, and that her consent was not so deliberate and determined as the nature of that most solemn contract required.

Prestongrange, in this case, said that he did not think it was a clear point that, by our law, a woman could be married before the age of fourteen; and for this he quoted the authority of Skene, *de Verb. Sig.*, Craig, and Stair; for though several of our authors speak of twelve as the nuptial age, yet they speak so rather as Roman lawyers than as Scotch; at least he thought the age betwixt twelve and fourteen a dubious age, in which it required the fullest proof both of her deliberate and full consent, and of her bodily capacity for