against the service, if he thinks fit to carry it on. Besides, the service may be useful for other purposes. A man may need it to enable him to make settlements. A special service includes a general one *ejusdem generis*; the heir will thereby have right to all subjects falling to him as general heir; and though he may not be able, at the time, to point out other subjects or rights which will fall to him as general heir, yet that can be no objection to his service: such subjects or rights may afterwards be discovered. And as it is of the greatest importance for every man to vest in him the rights and subjects of his predecessor *quamprimum*, the law will not allow his service to be impeached by a third party, who pretends no sort of title to compete with him in his service. To stop the services of heirs is a matter of very great delicacy. No. 32.

Further, the claimants are not bound *in hoc statu* to debate, whether they will be obliged to denude or not. When they are served, and the proper action is brought against them for that purpose, it will then be time enough to give reasons why they are under no obligation to denude: But surely it is preposterous to enter into that debate at present. It is enough to say, that the fee is not full, and that they are entitled to fill it. *Frustra petit*, &c. is a maxim of equity, rather than of law. And it is a good answer, if the claimant can say, "I will not restore;" or this is not the proper time and shape for discussing the question, Whether he is bound to restore or not? Case of Sir James Suttie *contra* Duke of Gordon, No. 31. p. 14457.

Neither is it sufficient to say, that Mr. Douglas is *in cursu diligentiæ* in order to complete his titles. The claimants are also *in cursu*; and there can be no justice in stopping the course of their services, in order to give him an opportunity of getting the start of them. His title must be taken as it stands, not as it hereafter may be improved by further diligence.

"The Lords repelled the objection, and remitted to the macers to proceed in the services of the Duke of Hamilton and Earl of Selkirk."

For Mr. Douglas, *Hamilton Gordon, Burnet, Montgomery, Garden, M'Queen, Rae, Ilay Campbell, Alexander Murray.*

For the Duke of Hamilton, *Lockhart, Sir John Stewart, John Campbell, junior, Walter Stewart, William Johnstone, Sir Adam Ferguson.*

For the Earl of Selkirk, *Advocatus, Sir David Dalrymple, Patrick Murray, Wight, Crosbie.*

Fol. Dic. v. 4. p. 275. Fac. Coll. No. 58. p. 153.

1784. *February* 20. JOHN SPALDING *against* MARGARET LAURIE.

No. 33.
How far the service of one, as heir of tailzie and provision, is suffi-

WALTER LAURIE executed an entail, by charter and infeftment, of his lands of Bargattan, with the usual restrictions, *de non alienando, vel contrahendo debita.* He afterwards purchased the teinds, which were disponed "to him and his successors in the lands." But on this disposition no infeftment followed.

No. 33.
cient to vest an estate regulated by a simple destination?

The rule, that a special service includes a general one, how applicable to that of a person as heir of entail?

After the death of Walter Laurie, his nephew, James Laurie, expeded a service as heir of tailzie and provision in the lands of Bargattan, and possessed the estate for more than three years.

James Laurie dying without issue, his sister, Margaret Laurie, served herself heir of tailzie and provision to him in the lands of Bargattan. She likewise expeded a service as heir of tailzie and provision to her uncle Walter Laurie in the teinds of these lands, under the entail and disposition which have been already mentioned.

John Spalding, a creditor of James Laurie, pursued Margaret Laurie, as representing her brother, on this ground, That the teinds having been held by him unfettered by any entail, were liable for his debts.

Pleaded in defence: It is the nature of all accessorial rights, to receive the qualifications and restrictions incident to the subject to which they are annexed; Stair, B. 3. Tit. 5. § 12.; Earl of Selkirk *contra* the Duke of Hamilton, No. 112. p. 5554. *voce* HERITABLE AND MOVEABLE. Thus, the teinds in question, in place of descending to the heirs general of the acquirer, must go to the heirs of tailzie specified in the investitures of the lands. Upon the same principle, it must be found, that the teinds were entailed. The intention of the defunct, to unite the lands with the teinds, and to transmit both to the same series of heirs, cannot be more apparent than his resolution to preserve that union, and to secure the rule of succession which he had chosen; nor could any thing be more inconsistent than to give effect to his presumed intention to perpetuate his whole estate in a particular order of succession, to the absolute exclusion of his heirs-at-law, and at the same time to leave a part of it subject to the caprice or imprudence of his successors.

To this it must be added, that teinds, though sometimes considered as a separate estate, and capable of being feudalised, are, in their original nature, only a burden affecting lands, arising from no feudal constitution, but supposed to be due to churchmen *ex jure divino*, and without any particular grant. Since the year 1633, their connection with the lands is so intimate, that an heritor acquiring the teinds of his estate is not thought to have made a new acquisition, but is said to consolidate them with the stock. As a proprietor, therefore, of an entailed estate, obtaining a liberation from any other servitude, would be under no necessity, for preventing its revival, to execute a new entail, so, in this instance, the purchase of the teinds of an estate strictly entailed, particularly when devised "to the purchaser and his successors in the lands," must be equivalent to their being formally included in the prior settlements.

It is only on the supposition of their being entailed, that the teinds were transmitted to the pursuer's debtor. James Laurie's service, as heir of "tailzie and provision," did not invest him with the double character of heir of tailzie and heir of provision; the latter term in the retour being merely exegetical, and synonymous with the former. It entitled him to subjects limited by entail, not to those which were not entailed, but regulated by a simple destination.

The teinds, therefore, if not subject to the restraining clauses which affect the lands, could only have been vested by a separate service in the character of heir of provision. No. 33.

Again, the character of heir of line, of heir-male, or of conquest, in any succession, can only belong to one person. A service, therefore, in special, in any of these characters, must at once establish the title of the claimant to all personal rights, destined by provision of law to successors of that particular quality; Stair, B. 3. Tit. 4. § 33. Accordingly, it has been found, that such a service, as including in it a general one of the same kind, will carry rights not clothed with infeftment, in the same manner as if the heir had completed a general service apart; Erskine, B. 3. Tit. 8. § 75. But it is otherwise with respect to heirs called to the succession by the deed of the proprietor. The number of these may be as great as there are subjects, in which the succession *ab intestato* is excluded. It does not therefore follow, from the nomination of a person to succeed in one estate, that he is at the same time called to the inheritance of a different tenement, destined perhaps to the same series of heirs, but regulated in its transmission by a different deed. Hence, the services of heirs of entail and of provision are precisely limited in their effects to the particular estates enumerated in the claim of the party served, and transmitted by the writings laid before the inquest. According to this rule, the special service of James Laurie, as heir of tailzie and provision in the lands of Bargattan, did not carry the teinds. These remained *in hæreditate jacente* of Walter Laurie, till taken up by the defender as heir to him, and of course cannot be liable for the debts of any other person.

Answered: The governing rule in questions of succession being the presumed will of the deceased, the transmission of accessorial or subordinate rights has been made to depend on those which are primary, and eminent in their nature, it being altogether improbable that the defunct meant to separate the one from the other. But limitations on property and the freedom of commerce are not to be inferred from presumptions, however strong. Nay, since entails derive their sole efficacy from the statute 1685, which requires the authority of the Court of Session to be interposed, and the registration of the infeftments on which the burdens are imposed in a record kept for that purpose, it is plain that they never can extend to subjects acquired after their date. Nor can teinds, especially when transmitted as a separate estate, be distinguished from other heritable property.

The limitation of a service, as heir of tailzie and provision, to subjects strictly entailed, is far too critical, the words being, with great propriety, applicable to all those in which the heirs are not called in their legal order. Nor is the distinction better founded between special services in subjects descendible to heirs-at-law, and such as are used for transmitting entailed estates. The general rule is, that a special service, of every description, includes a general one of the same character and effect; Stair, B. 3. Tit. 5. § 25.; Erskine, B. 3. Tit. 8. § 51. The teinds, therefore, being devised in the same manner with the lands, the special service,

No. 33. which was effectual to transmit the one, must be equally effectual to convey the other.

The Lords unanimously agreed that the teinds were not entailed. They were equally clear, that James Laurie's special service in the lands did not carry the teinds. It was, however, suggested, that the defender, by her service as heir to her uncle in the teinds, passing by her brother, who had been more than three years in possession, was, in terms of the statute 1695, liable *in valorem* of that subject.

The Lords accordingly "found the defender liable *in valorem* of the teinds." See TAILZIE.

Lord Ordinary, *Hailes*. Act. *G. Wallace, Honyman*. Alt. *Wight, Rolland*, Clerk, *Home*.

Fol. Dic. v. 4. *p.* 274. *Fac. Coll. No.* 148. *p.* 230.

SECT. VI.

Precept of CLARE CONSTAT.

1747. *July.* SYMMER *against* DOIG.

No. 34.

MARGARET SYMMER, as standing infeft upon a precept of *clare constat*, as heir to her predecessor in an annual-rent right, pursued an action of mails and duties of the lands, wherein Provost Doig, of Montrose, who stood infeft in the lands on a title posterior to the constitution of the annual-rent, compeared, and objected to the pursuer's title, that a precept of *clare constat* was not sufficient to instruct that she was heir to the annual-renter.

Answered for the pursuer, That though a precept of *clare constat* is not sustained as a proof of the propinquity with respect to any other subject, yet it is sufficient to complete the heir's title with respect to the subject wherein she is infeft.

Replied, That an infeftment on a precept of *clare constat* completes the feudal right without a special service; yet it has never been sustained to found a demand for payment without at least a general service.

This debate went no further than the Lord Ordinary, nor was any interlocutor given on it, the pursuer having, to prevent further trouble, served herself heir in general. But so however the law is thought to stand, that the personal obligation requires to its transmission a general service.

Kilkerran, (PRECEPT OF CLARE CONSTAT), *No.* 3. *p.* 414.