tailzie of debts, yet if the maker of the tailzie convey or oblige his heirs of line and executors to convey his personal estate to the heirs of tailzie, whether in that case any obligation lies on the heir of tailzie to apply the estate in payment of the debts, and to relieve the tailzied estate? 2dly, If such an obligation lies, and he does not so apply, and that the next heir has an action of damages against the general heirs and representatives of the first heir, whether that second heir can discharge it, so as to bar the third or remoter heir when he succeeds?—or if the applying those very funds to the use of the second heir will be a defence against the third or remoter heir, since the tailzied estate never was relieved? 3dly, How long that action subsists; for the first heir succeeded in 1681, and lived till 1737, whereby the sustaining action now against his representatives was in effect to oblige them to preserve all the vouchers of the debts owing by the maker of the entail for 70 years; for if these were not all preserved, it could not appear whether his other debts besides the two in question did not exhaust all his personal estate, &c. &c.

No. 42. 1751, July 17. Strang *against* Strang.

James Strang, in his contract of marriage in 1682, provided his little estate of Meikle-Earnoch to the heirs and bairns of the marriage, and in his old age, when the estate was only L.537 Scots of rent, burdened with L.8000 of debt, made a strict tailzie, and in the substitution prefers his own daughters and their issue to his son's daughters, failing heirs-male.—The eldest son pursues reduction, and the defenders repeated a proving the tenor, and were allowed to bring a proof, which was remitted to the process of reduction;—and this day we sustained the reasons of reduction on the contract of marriage.

No. 43. 1751, July 25. Sir John Douglas *against* David Douglas.

Sir John pursued reduction of a tailzie made by Sir William his father, who by his contract of marriage in 1705, providing the estate to the heirs-male of the marriage, and the heirs-male of his body of any other marriage, which failing, the heirs-female of this marriage; and yet by the tailzie, besides the limitations and irritancies contrary to the contract, his own daughters are preferred to all the daughters of all the sons. Kilkerran, Ordinary, sustained the reasons of reduction; and this day on a reclaiming bill and answers we adhered, *nem. con.*

No. 44. 1751, Dec. 17. Case of the Estate of Cromarty.

Claim by George M'Kenzie, second son of George Earl of Cromarty attainted. He claimed, as heir of entail made by old George Earl of Cromarty to the forfeiting person, and heirs-male of his body, and other substitutes; and for himself and other substitutes (in general) claimed the estate after the death of John, his elder brother, (who did not claim, and got a pardon on condition, I believe, that he should not claim) first on irritancies incurred by the forfeiting person by contracting debts, and suffering many adjudications to pass; 2dly, for that the Earl could only forfeit for his own life; and in the course of the debate insisted that, as the House of Lords had done in the case of Park, we should determine how long the estate was forfeited, and when it would not be forfeited;—and compearance was made for Captain M'Kenzie, the Earl's brother, as a

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