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

certain other heirs, which was recorded in the Register of Tailzies in July that year. In 1725 he had two sons, Lawrence, and the claimant Charles; and then executed a new procuratory of resignation to himself, and his son Lawrence, and longest liver of them two, and after the death of the longest liver to the heirs of Lawrence's body, which failing to Charles, and heirs of his body, which failing, to the same series of heirs he had named in the former tailzie, with and under the whole limitations, restrictions, and clauses irritant, specially contained in the said bond of tailzie, and that they should be contained in all the charters, infeftments, &c. to follow on the said procuratory and former bond of tailzie; but did not repeat them in this last procuratory otherwise than by the said reference, neither was this last procuratory recorded in the Register of Tailzies; but upon it and the former tailzies a charter was expede to Sir Lawrence, and his son and heirs, whom failing to Charles; and the limitations, and irritant and resolutive clauses in the tailzie 1722 were all inserted, and thereupon Sir Lawrence and his son were infeft. Sir Lawrence died, and his son Lawrence possessed the estate till 1746, that he was convicted and attainted of high treason, and died in prison without issue. Charles claimed the estate as heir in remainder by the procuratory 1725, agreeably to the judgment of the House of Lords in the case of Captain Gordon. Answered, the procuratory 1725 was not recorded, and therefore not effectual by the act 1685, and by the tailzie 1722 the claimant had not a remainder, but was called to the succession only as his elder brother was, by becoming heir-male of that marriage; neither could the charter proceed upon that tailzie 1722, wherein neither his brother nor he was named, far less did give any fee to the brother. Replied, though by the law of Scotland tailzies were ineffectual against singular successors without being recorded, the law of England must be the rule of judging this case, where recording is not necessary, and by that law he had a right in remainder; nor is it necessary by that law that the forfeiting person should have been disabled to alien, for there entails can be defeated and docked by fine and recovery, and yet the heir in remainder is safe. 2dly, Recording the procuratory 1725 is not necessary by the law of Scotland, because the tailzie 1722 was recorded; and if an heir of entail were settling his estate on his eldest son, it is not necessary, nor ever practised, that that settlement should also be recorded; or if Sir Lawrence had assigned the procuratory 1722 to his son, he needed not to have either repeated all the limitations in that assignation, or to record it in the Register of Tailzies. Duplied; by the claimant's argument, the substitutes called *nominatim* in simple destinations of succession, would be heirs in remainder, and safe against the forfeiture of the institute; but that the laws of Scotland must be the rule of judging of our land rights in forfeitures, as well as in other cases, only it must be by analogy to the law of England; that in England, heirs of entail were saved from the forfeiture of the tenement in possession only by the statute *de donis conditionalibus*, which made them unalienable, and continued so even after the lawyers had devised a method of docking them, till the statute of Hen. VIII. that made all estates of inheritance forfeitable, but with a *salvo* of remainders, so that still the foundation is their not being in the eye of the law directly alienable, and therefore what is directly alienable in Scotland must be forfeitable, for where it is so alienable, there could be no estate created to the person in remainder. 2dly, That the procuratory 1725 alone was that on which resignation was, or could be made, though the reference made to the tailzie 1722 was

warrant enough for taking into the charter the limitations in that tailzie, and therefore ought to have been recorded; and 10th January 1751, (No. 17, *voce* FORFEITURE) we dismissed two claims founded on a tailzie of the estate of Sir James Kinloch Nevay, for that the tailzie was not recorded. The Lords dismissed the claim, because the procuratory 1725 was not recorded. *Renit. tantum* Drummore *et* Kames. For the interlocutor were President, Minto, Strichen, Murkle, Shewalton, and I. Kilkerran absent in the Outer-House.

No. 48. 1752, Nov. 28. M'CULLOCH of Barholm *against* M'CULLOCH.

THIS was a question of reducing two most ridiculous entails and trust-rights, whereby, excepting a small aliment to the heir, the rents were to be applied for many years for purchasing other estates, and entailing them in the same manner. We all agreed to reduce the whole deeds, and remitted to the Ordinary to allow the pursuer if he pleased to prove the reason of death-bed against the last deed. I inclined to give that proof first, though I agreed in opinion as to the other reasons; but the Court did as above.

No. 49. 1752, Dec. 5. ALEXANDER LESLIE *against* LESLIES.

THE deceased Findrassie executed an entail of his estate all written with his own hand, and probably of his own framing, with irritant and resolutive clauses, and died in 1739, leaving four younger sons, all heirs of entail, and by a clause in the entail empowering all or any of the substitutes however remote to oblige the heir in possession to complete his titles. Thereupon these four sons pursue their eldest brother to complete them. He on the other hand pursued a counter declarator, or rather reduction for uncertainty and perplexity; and 2dly, to have it found that by the entail he was fiar or disponee, and not an heir of entail, and that therefore the limitations in the entail did not affect him. The first defence was founded on several inaccurate expressions in the entail in certain events that might happen, too tedious to narrate here, but the entail at large is bound in with the other prints. But the words as well as meaning were plain enough, that the estate should go to his four sons, and heirs-male of their bodies *seriatim*, and failing them certain other heirs; and it was observed, that if entails should be set aside for uncertainty or perplexity as to some events that might happen, very few would stand the test. As to the other, the dispositive clause and procuratory were indeed to such heirs as he should name, and failing such nomination, to those four sons and heirs-male of their bodies *seriatim*, &c. and all the limitations were expressed to be on the said heirs of entail, but then he expressly reserved the full and absolute fee to himself, and by the preamble and several other clauses of the entail, it appeared plain to me that he considered his eldest son, the defender, as first heir of entail, and that he intended the limitations on him as well as the rest. However the Court was much divided. The case was reported by me, and they repelled the first defence, the uncertainty and perplexity, six to five, and the President and Strichen did not vote. But the second defence was sustained by the President's casting vote, 24th July; and 5th December the Lords adhered to both, but were still much divided in both.