Another distinction is to be made betwixt the interest of tenants in tail competing with the interests of after-heirs. In the *first* case, the entail is strictly interpreted, so as to be beneficial to the creditor; in the other case, it is fairly and benignly interpreted, so as to be beneficial to the after-heir, and to the will of the entailer. Thus tailzies, without being recorded, have frequently been found good against an heir of entail in possession, though not against creditors; and a prohibition to alter the entail, will bar the tenant in tail from altering it, though it will not bar a creditor from attaching it. No. 37.

And therefore, when a tenant in tail does a thing to hurt the after-heir, from a desire of disappointing the entail, there the law, in favour to the will of the entailer, ought to interpose.

"The Lords refused the bill of suspension."

For Suspender, *J. Dalrymple, And. Pringle.* Alt. *J. Craigie, Lockhart, Ferguson.*

J. D. *Fac. Coll. No. 13. p. 22.*

1757. *March* 9.

CAPTAIN WILLIAM LIVINGSTON *against* FRANCIS LORD NAPIER.

No. 38.
Whether the fee of an estate vests *ipso jure*, without a service, in a *nominatim* substitute in a tailzie?

Mary Countess of Callender, afterwards Countess of Findlater, in her contract of marriage with Sir James Livingston, her second husband, was provided to the property of the lands of Westquarter, failing issue of the marriage.

Sir James having died without issue, Dame Helen Livingston, his niece, was served heir to him, and obtained herself infeft upon a precept of *clare constat* from the superior. These titles were made up, in order to enable her to denude of the lands in favour of the Countess of Findlater, in terms of the above contract of marriage. And accordingly, in 1704, she executed a disposition of the lands to the Countess, containing procuratory and precept; but upon this deed no infeftment followed in the person of the Countess.

In 1705, the Countess of Findlater, with consent of her husband, granted procuratory for resigning the said lands, "in favour, and for new infeftment of the same to be made and granted to her, and the said James, Earl of Findlater, her husband, and longest liver of them two, in life-rent and conjunct fee, for the Earl's life-rent use thereof allenarly; and to James Livingston, third son of Alexander Livingston of Bedlormie, and the heirs-male to be procreated of his body; which failing, to his other heirs-male whatsoever," &c. This procuratory contains the usual prohibitory, irritant, and resolutive clauses, *de non alienando vel contrahendo*, with certain reserved powers in favour of the Countess herself; and she thereby "assigns and dispones to the forenamed persons, the hail rights, evidents, and securities of the said lands."

The Countess of Findlater having died soon after the execution of this settlement, the succession opened to the said James Livingston; who, in 1706, took infeftment upon the precept contained in Helen Livingston's disposition to the

No. 38. Countess. This sasine narrates the tailzie, with the prohibitory and irritant clauses therein contained.

In 1728, James Livingston obtained a charter from the superior upon the procuratory contained in Helen Livingston's disposition, and was thereupon infeft; but none of the prohibitory and irritant clauses were repeated either in the charter, or instruments of resignation and sasine.

Soon after, James Livingston sold these lands to Mr. William Drummond of Grange; who again, in 1734, sold the same to Lord Napier, the defender.

James Livingston died without issue; whereupon Captain William Livingston, his immediate younger brother, procured himself to be served heir of provision and tailzie in general to the Countess of Findlater, as supposing the infeftments that had been expede by his brother James to be void and null, in regard he had neglected to procure himself to be served heir of tailzie and provision to the Countess; and consequently, that the personal right of the lands still remained *in hæreditate jacente* of the Countess. And he having taken infeftment upon the precept in Helen Livingston's disposition to the Countess, which, as being still unexecuted, he pretended to carry by the foresaid general service, he insisted in a process of reduction of all the intermediate title-deeds, under which these lands were possessed by the defender.

Objected, That the pursuer has made up his title improperly, by serving heir of tailzie in general to the Countess of Findlater, after she was denuded of the right of the land by the infeftment taken by James Livingston: That he ought to have made up his title by a special service to James Livingston, the person last infeft; and until such title is made up, the defender is not obliged to produce his rights, or enter into a dispute with him.

And, in support of this objection, it was pleaded for the defender, That James Livingston was entitled to execute the precept and procuratory in Helen Livingston's disposition to the Countess of Findlater, without the necessity of a service, by virtue of the special assignment to the writs and evidents, either as joint nominee or institute with the Countess, or as *nominatim* substitute to her. He is not called, in the procuratory granted by the Countess, under the character of an heir of tailzie, or heir-substitute, which might have made a cognition or service necessary, to show that the intermediate heirs had failed; but the very same words which granted procuratory for resigning in favour of the Countess herself, do likewise apply to James Livingston, whereby he was constituted joint disponee or institute with her, and must regularly have been infeft along with her upon the precept of sasine contained in the charter, if ever her procuratory had been executed; and therefore, as assignee to the writs and evidents, he was entitled, after the death of the Countess, to execute the procuratory and precept in Helen Livingston's disposition, in the same manner as the Countess herself could have done. Nor was there any occasion for a service in his person for that purpose, as no heirs could intervene between him and the Countess, whose failure behoved to be cognosced; more especially where all the right that the Countess herself had,

was but a personal disposition; Stair, Lib. 3. Tit. 5. § 6. and § 25; Bankton, Lib. 3. Tit. 5. § 88; July 23, 1675, Lamington against Muir, No. 45. p. 4252. February 4, 1680, Robertson against Preston, No. 4. p. 14357. If, therefore, the fee of these lands was properly established in James Livingston, without a service, the pursuer's service, as heir of tailzie and provision to the Countess of Findlater, is inept, and can never give a title to challenge the right derived from James Livingston, the person last vested in the fee. No. 38.

Answered for the pursuer: The Countess of Findlater, at the time of her death, was the only fiar and proprietor of these lands. The fee still remained with her after the tailzie; and James Livingston is only called to the succession upon her death. It is impossible, therefore, that she could be denuded of this fee upon her decease, without a service; *Mortuus nunquam sasit vivum.* If a property is once vested, it cannot be transmitted, either from the "living" or from the "dead," but by a document in writ. The security of our records depends upon the strict observance of this rule. A *nominatim* substitution is allowed to supply the place of a confirmation in personal bonds; but it will not supply the want of a service in land-rights, whether completed by infeftment or not; Dirleton, p. 149. Tit. Heirs of Provision, and, Substitute; Dict. Decis. Tit. Service and Confirmation, Sect. 2. James Livingston, therefore, without being served heir to the Countess, had no title to execute either procuratory or precept. He could only take the lands as heir-substitute to the Countess, the proprietor thereof; and it is against all the principles of law, to maintain, that an heir-substitute in lands, though *nominatim*, can be vested in the estate *ipso jure*, without a service; and consequently there was nothing in James Livingston's person which could be taken by a service, as he did not connect his title to the fee that was in the Countess; and which therefore remained in her *hæreditas jacens*, until it was transmitted to the pursuer by his general service, and is now fully vested in him by his infeftment.

The Lords repelled the objection, and found, that the pursuer had a sufficient title to force production of all deeds granted by the Countess of Findlater to James Livingston.

Act. *Ferguson.* Alt. *And. Pringle, Lockhart.* Clerk, *Forbes.*

G. C. *Fac. Coll. No. 23. p. 38.*

1757. *December* 1. GORDON *against* MAITLAND. No. 39.

A creditor in debts affecting an entailed estate, having himself succeeded to the estate as heir of entail, the Lords found, That the debts were not extinguished *confusione*, but that after his death his heirs whatsoever could pursue for them against the succeeding heir of entail.

Fol. Dic. v. 4. p. 344. Fac. Coll.

*** This case, in which there are other particulars relative to entails, is No. 359. p. 11164. *voce* PRESCRIPTION.