No. 258. leave to whom he pleased the 5000 merks, and it is like he hath left it to his other daughters, and the bond may be made use of to overturn his whole intent, and alter the tailzie.

The Lords found, that seeing the first disposition contained a dispensation with delivery, and the rest being accessory thereto, and only altering in some things the tailzie, but still to the first heir of tailzie, being the son of Inglistoun's marriage, they ordained them all to be delivered up, and the bond also, but with this declaration, that the provision anent the 5000 merks in the first disposition, should be holden as repeated in the rest, that the heirs of line might be in no worse case than by the first, and that the bond should only be made use of according to the substitutions, and clauses of the tailzies.

Stair, v. 1. *p.* 643.

1675. *June* 23. BRUCE *against* BRUCE.

No. 259.

An heritable bond by one to his nephew found effectual, though never delivered, sasine having been given thereupon, which was in the public register, whereby there was *jus quæsitum* to the nephew.

Stair. Dirleton.

*** This case is No. 365. p. 11185. *voce* PRESCRIPTION.

1677. *July* 26. STEVENSON *against* STEVENSON and her HUSBAND.

No. 260.
A disposition of tailzie latent and incomplete, lying by the maker at his death, was found effectual, though neither delivered, nor containing a clause dispensing with the not-delivery.

Umquhile John Stevenson of that ilk, by his contract of a marriage, provided his estate to his heirs-male of the marriage, and failzieing heirs-male, provides 5000 merks to the heirs-female; but there being no heirs-male of the marriage, he disponed his estate to his eldest daughter Margaret Stevenson, she always marrying one of the name of Stevenson, or who would assume the name of Stevenson, wherein if she failzied, that she should lose her right, to belong to Janet the second daughter; and if she failzied, to the third daughter. Margaret the eldest daughter marries George Moorhead. Janet the second daughter pursues Margaret and her husband, for declaring that Margaret had lost her right, her husband having not assumed the name of Stevenson, and that therefore Janet had right to the estate in the terms of tailzie. The defender alleged, that this disposition of tailzie was a latent and incomplete right, that took no effect, and that it was never delivered, nor did it contain a clause dispensing with delivery, and so was passed from by the father, who lived three or four years thereafter. 2*do*, This disposition can have no effect against Margaret, because she neither did, nor was

obliged it to know. *3tio*, Because there being a provision in her mother's contract of marriage of 5000 merks to the eldest heir-female, her father could do no voluntary deed to exclude her from this provision, therefore she might and hath taken her to it only; and in her contract to George Moorhead, hath assigned the 5000 merks only, which she did with consent of her nearest relations. It was answered for the pursuer, that this disposition was a valid deed, by which the defunct obliged himself and his heirs to perfect this tailzie, which therefore must be effectual against all representing him, and especially against Margaret, who by her provision must be heir of the marriage; neither doth it require any delivery, or dispensation for not delivery, which is only requisite to rights made to strangers *extra familiam;* but they being in the family, their father being lawful administrator to them, his custody was their custody; neither can the defender pretend ignorance, having got her father's charter-chest, in which this disposition was; and though she could only excuse her husband's not taking the name, till he was interpelled, or if he will now assume the same, the pursuer acquiesces; but this being an ancient, though small family, of 300 years standing, the design of the defunct hath both justice and favour for it. It was answered for the defender, That she having married with the consent of her friends, being in a probable ignorance of this tailzie, whatever might have been done against her before she was married, yet being now married, her husband will not assume her name, and so is *factum imprestabile*; nor can he be blamed, the estate not exceeding 1,000 merks rent yearly, and under considerable burden; neither will this tailzie preserve the estate at this time, seeing it contains no clause *de non alienando*; but whatever it might import, no voluntary deed of her father's, after the contract of marriage, can exclude her from her annual-rent of 5,000 merks; for though as heir of provision, she were obliged to perform the onerous and warrantable deeds of her father, yet she is not simply heir, but an heir of provision, and so a creditor, whereby she might reduce any posterior deed done by her father, not for an onerous cause, especially the alteration of the succession, contrary to the contract of marriage; for it is unquestionable that this case is very ordinary, by a first contract of marriage, to provide for the heirs and bairns of that marriage, and by contract of a second marriage, to provide the heirs and bairns of that marriage; and yet the heirs of the first marriage will not be obliged to fulfil the contract of the second marriage, if it derogate from the first; and if it were otherwise, all provisions in contracts of marriage were elusory, and the contractor by unnecessary and gratuitous deeds might evacuate the same.

No. 260.

The Lords found, That the eldest daughter might betake herself to her provision of her 5,000 merks, and renounce the benefit of this tailzie, which she was not obliged to fulfil, as being a voluntary deed of her father's after the contract of marriage, contrary to the provision therein, in favours of the eldest daughter; but found the disposition of tailzie valid without delivery, and that the second daughter had right thereby to the estate, and might obtain implement thereof

No. 260. against her father's general heirs, either male or line, or heirs-portioners, but with the burden of Margaret's provision of 5,000 merks.

Stair, v. 2. p. 550.

*** See Gosford's report of this case, No. 77. p. 15475. *voce* TAILZIE.

1679. *December* 11. STARK *against* KINCAID.

No. 261.
A disposition of land sustained, though found among the disponer's writs at his death, without a clause dispensing with not delivery, as it bore a clause reserving the disponer's liferent, and power to alter.

Robert Stark having adjudged two acres of land belonging to umquhile Robert Nasmith, pursues a reduction of a disposition granted of the same acres by Nasmith to Thomas Kincaid on this reason, that the said disposition is already proved to be amongst Nasmith's writs the time of his death, and therefore was never a delivered evident, and so null. The defender alleged absolvitor, because the disposition bears "a reservation of the disponer's life-rent, with power to alter during the disponer's life," and therefore without delivery, or a clause dispensing with the not-delivery, the writ is effectual, and equivalent, as if a dispensatory clause were inserted, especially seeing the defunct had no children. There was a practique produced for the like *in anno* 1668, Hadden against Shorswood, No. 256. p. 16997.

Stair, v. 2. p. 720.

*** Fountainhall reports this case:

Reduction of a disposition because undelivered. Answered, It bears a power to alter and renovate, which is in law equivalent to a clause dispensing with the not-delivery, as was found 19th June, 1628, Agnes Hadden and Mary Lauder against Shorswood, No. 256. p. 16997. The Lords found this reservation of a liferent, and to alter, had the force of a delivery; but likewise that it included a power to contract debts, and therefore found it was burdened with the debts contracted by him after the date of it; which last interlocutor was on the 23d December, 1679.

Fountainhall MS.

1680. *January* 6. M'BRIDE *against* BRYSON.

No. 262.
A declaration under the hands of a defunct, that a disposition which he had

James M'Bride having adjudged a tenement in Edinburgh from the heirs of Mr. Andrew Bryson, pursues a reduction of a disposition by the said Mr. Andrew to Andrew Bryson his cousin-german, on this reason, that the disposition "reserves a power to the Bailie at any time in his life, *etiam in articulo mortis*, to dispone this tenement, or to alienate or wadset the same;" and long thereafter there is a de-