1683. *November.* STARK *against* BRUCE.

No 9.

FOUND that a bond payable to a woman, she being in life, and to her daughter, after her decease, made the daughter-substitute liable for the mother's debt *quoad valorem*, but not by any universal passive title, viz. after heir-general was discussed.

Fol. Dic. v. 2. *p.* 345. *Harcarse,* (BONDS.) *No* 189. *p.* 42.

1705. *December* 13.

GILBERT LIVINGTON and his Factor *against* Mrs MARGARET MENZIES and the Heirs of Line of SALTCOATS.

No 10.
Found, that a general retour, as heir of line, carried right to a provision in a contract of marriage, in favour of heirs male, both characters coinciding in the same person; and that it empowered him to evacuate the provision, by disponing to heirs whatsoever.

GEORGE LIVINGTON of Saltcoats, with consent of his curators, having, in the year 1655, by his contract of marriage with Mary Hepburn, daughter to the Laird of Beinstoun, obliged himself to tailzie his estate to himself, and the heirs male to be procreated betwixt them; which failing, to his nearest heirs male whatsomever; Alexander, his eldest son, disponed the lands to George the younger, and to his heirs and assignees whatsoever. Upon which disposition he was infeft, and entered by the superior; and granted a disposition or bond of tailzie in favour of Margaret Menzies, his sister-daughter. Gilbert Livington, as heir male to old George, pursued a reduction, improbation, and declarator against her, for removing the deeds to his prejudice, and for declaring and making effectual his right as heir male; upon this ground, that Alexander was a fatuous or furious person, incapable to dispone to his brother; and the disposition by George to Margaret Menzies must not only fall in consequence, *quia resoluto jure dantis resolvitur jus accipientis*, but also should be reduced *ex capite lecti.*

Alleged for the defenders; That the substitution in George Livington's contract of marriage 1655, (who was then minor) in favour of heirs male whatsoever, failing heirs male of the marriage, was null and reducible; because, 1*mo*, A minor with consent of his curators cannot cut off the natural and lineal succession of a family by a tailzie, which is an act of the highest importance, exceeding the verge of curators' administration, and upon the matter, a donation from which minors ought to be restrained; 2*do*, Though the contract was so far binding, that the obligement in favour of the heir male of the marriage, could be frustrated by no gratuitous deed; yet the substitution to other heirs male, in which the other party contracter was not concerned, is no *vinculum juris*, producing action, or a ground of inhibition, but a mere destination or a bond of tailzie for love and favour, revocable at the granter's pleasure. And as the substitution was no ground of action, so if any obligement

did thence arise, it is prescribed *non utendo* for the space of 40 years, by any infeftment or document upon it; 4*to*, Albeit the substitution had taken effect by infeftment, Alexander the fiar and heir of the marriage might alter the same, as he hath done, by disponing to his brother George, and to his heirs and assignees whatsoever; since he was not tied up by a prohibitory clause; *multo magis* might he in this case evacuate the substitution, which subsists only in the terms of an obligement to make a tailzie. No 10.

Replied for the pursuer; 1*mo*, A minor may in his contract of marriage tailzie his estate, with consent of his curators, to heirs male, for preserving of the family; which is a just and rational deed ordinarily done by prudent men. Minor enim qui Jure communi usus est, non potest videri circumventus, L. ult. C. De integrum restitutione. Et lædi vel decipi non videtur, qui jus publicum sequitur, L. 116. D. De Reg. Juris. And although the provision of tailzie had been quarrelable, it cannot be drawn in question now, the minor, who lived many years after his majority, having never revoked the same in his own time; 2*do*, The right arising to heirs male failing heirs of the marriage, could not prescribe; seeing they were not *valentes agere*, so long as heirs male of the marriage were existing; and George the last of these died but lately; upon whose decease the pursuer immediately claimed his right, And so it was decided January 25, 1678, Duke of Lauderdale against the Earl of Tweddale, No 374. p. 11193.; as upon the like ground warrandice prescribes only from the date of eviction. Again, prescription cannot take place in this case, because, the possession of the heirs male of the marriage is, in the construction of law, the possession of the other heirs male, as a singular successor is understood to have possessed by his authors; 4*to*, The disposition by Alexander in favour of his brother, is null and reducible, and consequently all that followed upon it; the granter being long before and after the disposition a furious and fatuous person, in so far as he constantly ran barefooted through the country, roaring and crying like a madman, to the terror of neighbours; attempted to kill his keeper, and also himself, by leaping over the windows some stories high in his shirt, and running into the sea and other waters. He could not keep himself clean, nor know when his excrements came from him; nor could tell his fingers. And consequently all that followed upon his disposition fell in consequence, seeing *quod nullum est, nullum sortitur effectum.*

Replied for the defender: When in the civil law curators had not the power to liberate and manumit servants, as being no act of necessary administration, but of absolute dominion; can it be thought that law will allow curators to make tailzies at their pleasure? and therefore such deeds, though made seemingly with consent of curators, ought to be understood in law as deeds of minors having curators without their consent, which are certainly null, needing no revocation? so that they cannot be understood as ratified by the minor becoming major, his suffering the *anni utiles* to elapse; 2*do*, An obligement here in favour of the substitute, is much the same with a bond of tailzie grant-

No 10. ed in favour of an institute, and substitutes. Now, if the institute should forbear to prosecute the granter to expede his infeftment conform to the bond of tailzie, the substitute might, nevertheless, by convening the granter and institute. compel the granter to expede his infeftment conform to his bond. It is groundless to allege that the pursuer was not *valens agere*, albeit he was not *valens succedere et possidere*, which concerns only the effect, and not the force of the obligement, that was no ways conditional; and therefore prescription did certainly run from the very date of the obligement, which is now prescribed. 3*tio*, Though Alexander might have been weak, and incapable to manage his estate, yet he was not so always; and such a fair and solemn disposition made by him to his brother, by advice and in presence of his friends, argue him to have been sensible and composed at the time. Besides, to raise a question, *de ejus statu et capacitate*, so long after his death, is contrary to law and reason. Yea, what Alexander did in favour of his brother George, was rational, and could be quarrelled by none but George himself, who was so far from it that he accepted it, was entered by the superior by resignation thereon, and obtained a charter containing a *novodamus*; and possessed by virtue of these titles for several years after his brother's death, when he might have entered otherways by service or precept of *clare constat*; which must be as effectual to empower him to alter the destination of succession provided in the contract, as if he had been actually infeft upon a service or precept of *clare constat*. For many cases could be instanced where inhabile titles are good and sufficient to the receivers acquiescing in them, who had the only right to quarrel them; July 25. 1672, Gray *contra* Gray, No 6. p. 4200. Nor are the qualifications of fatuity or furiosity relevant, since it is not alleged that Alexander was ill continually and without intermission. Besides, that the proving of fury or fatuousness by witnesses so long after the party's decease, would be dangerous, tending to take away writ by witnesses, who can hardly prove that the granter was not then in a lucid interval. And here the presumption stands for Alexander's being in such an interval, because he uniformly signed his name seven times to the disposition in favour of his brother, in the presence of his friends and relations, to each of whom he left just provisions which was a harder trial than the telling of his fingers.

Duplied for the defender; The disposition granted by Alexander to George, and his continuing to possess by virtue thereof can never supply the want of infeftment as heir in George's person, so as to give him any right to alter the destination of succession, which were a strange sort of transubstantiation, viz. a substantial change of one right to another of a quite different nature. And to support the disposition in favour of Margaret Menzies, upon the fiction of George's standing infeft as heir to Alexander, since it was in his power to be infeft, were to allow a *fictio fictionis*, that is reprobated in law. Besides, the disposition being reduced upon the head of fatuity, the charter granted by the superior upon George's resignation falls with it. As to the decision Gray *contra*

Gray, the infeftment there was not null for want of consent, but reduced as done on death-bed; 2*do*, If a furious person's deed were understood in law to have any effect, it could not be reduced unless the pursuer could allege prejudice and lesion thereby; but the principles of law do not require this. And in a reduction of a disposition *ex capite metus*, the Lords repelled this defence, that the disponer had no prejudice by the disposition which was granted in implement of a former minute; and to sustain this disposition in itself null because of the possession of one who was *alioqui successurus*, would be of dangerous consequence, and encourage the nearest agnats of furious persons to take advantage of their circumstances, and to elicite deeds from them, whereby they may immediately attain to the full possession of their estate; 3*tio*, The qualifications urged for Alexander's having lucid intervals are no ways relevant; for as a furious person may exercise the functions acquired and fixed upon him by education the time of his health; such as speaking Latin, or French, writing his name, whistling, or singing, and in the mean time be as destitute of the use of his judgment as a parrot; so a man may subscribe his own name and yet be fatuous and furious, a late instance whereof is William Mitchel. Yea furious persons are ordinarily taken up with nothing so much as writing, when at the same time they neither understand what they write or act; 4*to*, Fury is to be held as habitual and continued, contrary to the nature of lunaticism that has intromissions; unless the defender will offer to prove that Alexander had lucid intervals, or that the cause of his fatuous deeds was but temporary, such as intoxications by drink or the like, 19th July 1681, Burton *contra* Burton, See APPENDIX. And our law distinguishes betwixt lunatics who by the nature ot their distemper have lucid intervals, and persons of continued fatuity or fury that are not presumed to have such intervals, unless the same be proved; inferring that the deeds of lunatics, and not of furious or fatuous persons, are done in lucid intervals, unless the contrary be proved. *Vide Reg. Majest. Lib.* 1. *Cap.* 30. *N.* 3. 4. No 10.

THE LORDS waved the point whether a minor can break a tailzie or make a new one. Nor did they decide anent the prescription of the contract 1655, but generally thought it not prescribed according to the decision betwixt the Duke of Lauderdale and Earl of Tweddale, No 374. p. 11193. As to the other point, they repelled the reasons of fatuity and furiosity condescended on, and sustained the disposition made by Alexander to George, and assoilzied from the reduction.

1706. *January* 22.—IN the reduction and improbation at the instance of Gilbert Livington of Saltcoats, against Mrs Margaret Menzies and his other heirs of line, the LORDS having, December 13th 1705, repelled the reason of fatuity and furiosity; the pursuer *insisted* upon this ground, that the contract of marriage 1655, contained a tailzie to heirs male of the whole estate of Saltcoats, and Alexander Livington being only infeft in a part of that estate, his

No 10. disposition to his brother George and heirs whatsoever, did not alter the destination as to lands he was not infeft in. Now, that the whole estate was tailzied to heirs male, the pursuer endeavoured to make appear from hence, that George the father, by the contract of marriage, was obliged to infeft himself in the whole estate, and the old lady, for the well and standing of the house of Saltcoats, quit a part of her liferent lands in favour of the said George, his heir male. And there is another clause in these terms, because the estate of Saltcoats is tailzied to heirs male, so that the daughters and children female are excluded from all benefit thereof, therefore it was agreed, that they should have certain portions; whereby it is sufficiently clear, that the parties intended a tailzie of the whole estate in favour of heirs male; and the will or meaning of parties is the rule in all contracts, especially in tailzies and destinations of succession, quæ sapiunt naturam volentatum, L. 18. § 3. D. De instruct. vel instrum. legat. vid. Jul. Clar. Lib. 3. §. Testamentum, Questio 76. et mantica de conjecturis ultimarum voluntatum; 2*do*, Alexander Livington's service could not carry right to the provision in the contract of marriage in favour of heirs male, so as by any disposition from him to his brother, he could alter or revoke the clause in the contract in favour of heirs male whatsoever; because Alexander Livington is not infeft but only served heir general of line, and not heir of provision of the marriage, which are distinct provisions having different legal effects; 3*tio*, Albeit heritable provisions and obligations distinct from the lands, such as a bond to dispone lands or grant infeftments of annualrent, may be carried by a general service; yet when personal obligations go with the lands, as in the case of tailzies, the heir of tailzie cannot, though served heir in general and special, dispose of the lands unless he were infeft.

Answered for the defender; 1*mo*, The whole estate was not provided by the contract to heirs male whatsoever, but only the lands of Saltcoats within the Sheriffdom of Haddington, in so far as the first clause is expressly so restricted, and the posterior clause appointing portions to the daughters, because the estate of Saltcoats was tailzied to heirs male, is relative to the former; and the estate therein mentioned *narrative* cannot be understood in a more extensive sense than to comprehend what lies within the foresaid Sheriffdom; therefore Alexander being infeft in these, had power to alter the tailzie, even after the pursuer's way of reasoning, (whose strained conjectures from the meaning of parties are against law) since there is not one clause in that contract but what is taxative; and actus agentium non debent operari ultra eorum intentionem; 2*do*, *Et separatim*, Alexander, without being infeft in the whole lands provided by the contract to heirs male whatsoever, had right by his general and special service as heir of line, to destroy the tailzie; because, 1*mo*, As heir of the marriage, he had, even without necessity of a service, right to the provision in the contract, subsisting *in nudis finibus obligationis*, the heir of the marriage being creditor as to that; although, if the father had fulfilled the contract by taking the rights to himself and the heirs male of the marriage, these

could not pass into the person of the heir without a service. So Wallace *contra* Wallace, No 3. p. 9650, a pursuit was sustained at the instance of a bairn of the marriage, for implement of the contract, without being served. And *in anno* 1694, the Lords sustained process of constitution at the instance of John Carnegie only son of Kinfauns's second marriage, without a service, for performance of the obligements of the contract to heirs of the marriage, these being only mentioned *designative*; 2*do*, Alexander being served heir general and special of line, as eldest son to his father, had established in his person all that could belong to him by that propinquity, in the same manner as a special service includes the general; although the rights carried by the general service could not then be thought of. So in the case of Janet Kennedy and her Husband against Matthew Cuming, No 41. p. 6441, Matthew was found to have right *jure mariti* to certain provisions in the contract of marriage betwixt his wife's parents, albeit she was only generally served heir of line, and the competing party was the contracter's grandchild, And January 20, 1666, Lord Renton *contra* Feuars of Coldinghame, *voce* VIRTUAL, a disposition with resignation and infeftment was sustained, although the disponer was never infeft; because the superior, who might have received the disponer upon a precept of *clare*, did receive the assignee upon a resignation, which virtually contained all that was needful. *Ergo*, *multo magis*, a solemn cognition of the propinquity by service and retour, ought to be allowed to convey all rights belonging to the party served by that propinquity. Yea, an heir of line, by disponing in implement to the heir of provision, would establish the right in his person without being served; and therefore Alexander's being both heir of line and heir of provision, the two obligements were confounded. No 10.

Replied for the pursuer; The decisions cited by the defender, do not at all meet; for as to that of Wallace against Wallace, and Matthew Cuming's case, the Lords sustained process at the instance of the bairns of the marriage; and in the Lord Renton's case there was no service, but the vassal's having, after receiving a precept of *clare constat* from the superior, made resignation, and obtained a new charter, upon which he was infeft in the whole lands, was found sufficient. And this point is of universal concern, for if a general service should be sustained to carry such provisions, then by the same reason an heir of tailzie served heir in general, might, without being infeft, dispose of the tailzied lands in prejudice of the substitute in the tailzie, which is disagreeable to our law.

Duplied for the defender; Though heirs of line and provision may be distinct persons, having different interests, yet where they are in the same person, the cognition of the propinquity which furnishes the right is effectual to all intents and purposes depending upon that propinquity or nearness of blood; and we have but one common form of brieve for the heir general and of line; all the distinction of heirs being made in the service, in answer to the heads of

No 10. the brieve; and as in special services the heir would have obtained a precept for infefting; so by virtue of a general service he may take out any letters upon personal rights competent to the defunct. The objection to the decision betwixt Renton and the Feuars of Coldingham is nothing to the purpose; for the precept of *clare constat* never being completed by infeftment, was of so much less authority, as it is less solemn than a service.

THE LORDS found, that the contract of marriage *in anno* 1655, can be extended to comprehend no other lands than those particularly therein enumerated, and lying within the Sheriffdom of Haddington; and that Alexander Livington's general retour as heir of line to his father, gave him the benefit of the provision contained in the said contract, and enabled him to dispone in favour of his brother, albeit he was not infeft.

Fol. Dic. v. 2. *p* 345. *Forbes, p.* 53. & 74.

*** Fountainhall's report of this case is No 69. p. 3261, *voce* DEATHBED.

1708. *December* 17. Sir ROBERT HOME *against* Sir PATRICK HOME.

No 11.

A PARTY, who was both heir-male and heir of provision to his father, being served tanquam legitimus et proximior hæres masculus et provisionis virtute contractus matrimonialis, and having challenged a disposition granted by his father, after inhibition served on the said contract of marriage, which the other party alleged he was bound to warrant as heir-male, and representing the defunct; the LORDS found, that his retour did not singly make him heir of provision, (upon which title he might have challenged such deeds,) but likewise general heir-male.

Fol. Dic. v. 2. *p.* 345. *Fountainhall.*

*** This case is No 55. p. 12905, *voce* PROVISION to HEIRS and CHILDREN.

No 12.
One person being both heir of line and of provision, served himself heir in a subject falling to him only as heir of provision; but, at the same time, as he was

1710. *July* 18. The LAIRD of AYTON *against* The LADY.

SIR JOHN AYTON of that Ilk having married to his second Lady, Dame Margaret Colvil, he gave her a large jointure and liferent, and provided her children to 40,000 merks, besides the half of the lands of Kincraigie. Mr William Ayton, his eldest son of the first marriage, finding these provisions heavy and exorbitant, he serves himself heir to his father *cum beneficio inventarii*, and raises a reduction, improbation and declarator, against his mother-in-law, and her children, for restricting the extravagant provisions made in their favours, such as the estate, with the other debts on it, was not able to bear, and as being evi-