

thereof, even without the master's consent. And the word assignation properly and commonly taken, doth not signify an alienation of lands with *sasine* or tradition following thereupon, which ordinarily is in the words, *dare, concedere, alienare, disponere*, not *assignare*, which is ordinarily used in sums of money, tacks, rentals, and writs, or rights of lands, not of lands themselves. *3tio*. It is the *stilus* of writers to say, *heredibus et assignatis*; which especially *in cartis regis* cannot prejudice the superior; the King cannot be said to dispoise such a considerable interest of superiority, except he do it expressly; and if there were any thing in it, yet being the fault of the officers of state to suffer such a thing to pass, it cannot prejudice his Majesty.

Many arguments were adduced *pro et contra* from the feudal law and civil law, custom, and *Craig de feudis*; which the LORDS having fully heard *in præsentia*, and carefully considered, they repelled the whole allegiances, nor did they regard that the infeftment was given by Dirleton to his own oye, because he was not *alioquin successurus*.

*In præsentia.*

*Gilmour, No 80. p. 60.*

No 11.

1686. January 20.

COLONEL BORTHWICK *against* THOMAS LAURIE, Merchant in Edinburgh.

THE LORDS sustained the delivery of a paper, though not to the party, but to another for his behoof, though he knew nothing of it, and so could not accept it.

*Fol. Dic. v. 1. p. 511. Fountainball, v. 1. p. 394.*

No 12.

1714. December 8.

THE LORD LINDORES *against* JOHN STEWART of Innernytie.

THE deceased and present Lord Lindores made a tailzie of their estate in favours of certain heirs, reserving a faculty to this Lord Lindores, who was fiar, to alter, innovate, and dispose of the estate at his pleasure.

The said present Lord Lindores did, in anno 1706, grant a procuratory for resigning the foresaid estate in favours of himself and the heirs of his body; which failing, to John Stewart of Innernytie, and other heirs therein mentioned, under prohibitory and irritant clauses, as well upon my Lord, the granter of the procuratory, as upon the other heirs of tailzie.

Upon this bond no resignation followed, nor was it registered in the register of tailzies; but both the two tailzies were put in the hands of Oliphant of Carpelew, with a doquet on the paper wherein they were wrapped, written by my

No 13.

The maker of a tailzie containing irritant clauses upon himself, and all the substitutes, has right to call for the deed as his proper evident, to be cancelled or not at his pleasure.

No 13. Lord's hand thus, ' To the Laird of Carpew to be kept for the use of all concerned.'

My Lord Lindores pursues an exhibition of these tailzies against Carpew, and the same being exhibited in the clerk's hands, compearance is made for Innernytie, the next heir of tailzie, failing heirs of my Lord's body, who *alleged*, that these tailzies being put in Carpew's hand for the use of all concerned, he who was the presumptive heir had interest to crave that the tailzies might be registrated, because the last tailzie did contain prohibitory and resolute clauses upon the pursuer himself, the granter of the procuratory, as well as other heirs; and if the tailzies were given up to him, he would cancel the same, and thereby evacuate the tailzie and order of succession; *2do*. The said tailzies were depositated for the special use of the sub-titute heirs of tailzie.

It was *answered, 1mo*, to the deposition on which Innernytie founds his interest; he could not be admitted, because there was no deposition for the use of substitute heirs of tailzie, but only for the pursuer's own behoof, if he called for the same as he has done; and if he had neglected to call for them in his life, then there would have arisen an interest to the next heir of tailzie; but it can never be presumed that the custody was given to Carpew exclusive of the right of the maker of the tailzie; *2do*, The pursuer being the fiar and maker of the tailzie, upon which no resignation, registration, or infestment had followed, it continues yet as a mere destination ambulatory at the maker's pleasure, as has been frequently found, and especially in the case of Muirhead of Breadisholm\* against his daughter-in-law, where Breadisholm having granted a disposition in favours of his eldest son, an infant, in fee without any onerous cause, which he afterwards cancelled, the LORDS found, that he might lawfully do it, albeit infestment had followed upon it; and sicklike, 23d June 1713, Scot of Ralburn against Scot, *voce* TAILZIE, a tailzie being granted without an onerous cause in favours of the maker of the tailzie in liferent, and his father in fee, and failing heirs of the father and son, to other heirs of entail, the LORDS found the said tailzie, while it remained in the terms of a personal right not perfected by charter and sasine, was revokable and revoked by a posterior tailzie made by the maker of the said tailzie, with consent of his father the first member.

It was *replied*; *Unusquisque est rei suæ moderator et arbiter, et potest quam velit sibi legem decere*, and as by the first tailzie there was a faculty reserved to alter, so he might as he did by the second, lay a restriction upon himself as well as the other heirs of tailzie, and renounce that faculty whereby his power of alienating, or altering ceased; and *de facto* the tailzie contains a clause disabling him and all substitute heirs of tailzie to alter, whereby he becomes a limited fiar, and cannot contract debt, nor alter the order of succession, in prejudice of the substitute heirs of tailzie, to whom the is *jus quæsitum*; and though the tailzie was gratuitous, yet being made, it is every way as binding against the maker as if it were onerous. *2do*, Innernytie's interest is the more clear by

\* See General List of Names.

the depositions in Carpew's hands, to be kept by him for the use of all concerned.

No 13.

“ THE LORDS found, that the pursuer, who was fiar and maker of the tailzie, had right to call for delivery of the tailzie to him as his own proper evident, notwithstanding of the prohibitory and irritant clauses above mentioned.

*Fol. Dic. v. 1. p. 512. Dalrymple, No 123. p. 171.*

1732. *November.* CREDITORS OF AUCHTERLONY Competing.

No 14.

AUCHTERLONY, before absconding for debt, made a list of his bills, which he indorsed blank, and sent the whole in a letter to Spence his father-in-law, bearing, that he had sent the bills to him for the use of his creditors. After the bills came into Spence's hand, but before any meeting with the creditors, several of these creditors, taking the start, laid arrestments in the hands of the accepters of these bills. In a competition, the other creditors craved to be preferred, as the bills were delivered to Spence, their trustee, before the date of the arrestments. The arresters yielded, that a bill indorsed blank, delivered to a man for his own behoof, becomes his property; because, by such delivery, he is empowered to fill up the indorsation in his own name. But they contended, that Spence was trustee for Auchterlony, not for his creditors; that the bills remained still under the power of Auchterlony, since they were not delivered to his creditors, or to a trustee for his creditors; see *l. 14. § ult. D. De furtis*; and therefore, that the bills, as Auchterlony's property, were regularly affected by the arrestments.

“ The arresters were preferred.”

*Rem. Dec. v. 2. No 5. p. 11.*

1744. *January 4.*

Sir JOHN BAIRD *against* CREDITORS OF Mr HUGH MURRAY.

IN the year 1737, Sir James Rothead made a settlement of his estate, heritable and moveable, upon certain persons, as trustees for behoof of his heirs therein named. Hugh Murray, the only accepting trustee, did, in December 1737, confirm the moveables; and, not having leisure to execute the office of executor, he granted a factory to George Gordon writer in Edinburgh, to uplift the moveable debts, grant discharges, and to accompt to him for his intromissions. In September 1740, Mr Murray and George Gordon instituted an accompt upon the subject of the factory, by which George Gordon came to be debtor to his constituent in the sum of L. 286 Sterling, for which George Gordon granted bill of even date with the fitted accompt, payable to Mr Murray.

No 15.

A sum of money was put into the hands of a party, with a declaration that it was to be paid to the nearest of kin of a certain person. It was found the person who deposited it, might have re-claimed it.