No. 36.

To the *second*, That it was a general maxim of the law of Scotland, That a creditor might proceed to all sort of diligence, whether real or personal, against his debtor's estate; and he might either stop short, or convey his debt; and the purchaser might, in the same manner, pass from any part of his diligence, provided he did it not emulously, to the prejudice of a fellow creditor, without advantage to himself. In the present case, the personal creditors waved the preference given to the real debts that were in their persons upon the rents of the estate, in order that they might apply them to the payment of their personal debts, for which these rents were the only fund: That no rule of law or equity could oblige them to use the rights they had acquired to their own prejudice; and it was competent to them to apply their diligence so as they might save both debts, if they could; as was determined by the Court, February 22d, 1715, Brigadier Preston against Colonel Erskine, No. 27. p. 3376.

"The Lords found, That the creditors were entitled to apply the rents in question to the payment of the personal debts due to them, after payment of the annual-rents of the heritable debts affecting the entailed estate incurred during the life of the deceased David Earl of Buchan."

Act. *A. Pringle.* Alt. *Ferguson.* Reporter, *Kilkerran.* Clerk, *Forbes.*

G. C. *Fac. Coll. No.* 10. *p.* 18.

1757. *February* 16.

THOMAS HAMILTON of Fala *against* The VISCOUNTESS of OXFURD.

No. 37.

If an heir of entail in possession is entitled to cut trees, though the value of them is offered by the next heir?

Upon some differences betwixt the Viscountess of Oxfurd, then eighty years of age, and Thomas Hamilton of Fala, next heir of entail to her Ladyship in the estate of Oxfurd, she advertised a sale of all the planted timber round the mansion-house, and upon the estate.

Mr. Hamilton presented a bill of suspension. Her Ladyship did not allege the plantations lessened the yearly value of the ground.

She did not allege she had any dislike, in point of taste, to the plantations.

She did not allege she was to be a gainer by forcing on the sale; for Mr. Hamilton made offer of the price of the timber, provided she would allow it to remain uncut.

Pleaded for the Viscountess: She was not debarred by the entail from cutting the plantations; and as entails admit of no latitude of interpretation, she was at liberty to do whatever she was not debarred from doing.

Answered for Mr. Hamilton: A distinction is to be made betwixt the end of a tailzie, and the means of supporting it. The end is, the preservation of a family; the means are, prohibitions on the heir to alienate, and bars upon the creditors to attach: The end is the object of favour in law; the other the object of disfavour: The latter, for that reason, has always had a literal interpretation; but, for the same reason, the former should have a liberal one.

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