to the changes that are made on the debt secured; and though it may be admitted that a right in security, be it legal or conventional, subsists till the whole debt is paid. Yet the question is not whether the security subsists till the whole debt is paid, which is not denied; but the question is, to what extent of debt it subsists, and to that extent, and that only, can the security subsist.

" *July* 21.—Find that payments made, does not restrict the adjudication, but that the same is to be ranked for the whole, till what remains due be paid.

" It was considered that had a diamond been given in pledge, the pledge would be entire for the last farthing."

1758. *July* 28. WILLIAM EARL of HOME, *against* The OFFICERS of STATE.

THIS case is reported in *Fac. Coll. (Mor.* 10,777.) Lord KILKERRAN has the following note of what was said by the Judges.

" *July* 28.—It was argued by Kaimes with his usual ingenuity and accuracy, that patronages were not capable of prescription; but to this I could not agree, as it is a matter on which our law writers seem to agree, and there is no pulling up that by ingenious arguments, that it had been more reasonable to be otherwise, nor is even that plain. Who doubts but a right to a burial place may be acquired by prescription? and the arguments against it are the same, or rather stronger, as in the case of patronages. There are other acts of possession, *viz.* with respect to the teinds; nevertheless I should have a great doubt, that an incumbent's possessing on one act of presentation, would amount to a prescription. A second point was argued by *Affleck, and Colston, and Kaimes,* that the right in the crown to lands, and the right of the crown to patronages, were so far different, that the King was presumptive proprietor of all lands *jure coronæ,* but otherwise in patronages, as is fully argued in the petition; that the rule in these is

but nevertheless had this been the question, I should have been of opinion that the *jus coronæ* would have been a sufficient title; but neither of these questions are now to be determined, for that the third point seems to admit of no answer, that there was no possession here to infer a prescription, as the crown had right to present *per vices;* and therefore had right to present in two of the three

for the crown; and the vote being put *July* 28, 1758, the Lords altered and preferred the Earl of Home seven to six.

1758. *December* 14. JOHN PHILIP, Auditor of the Revenue in Scotland, *against* The EARL of Rothes.

THIS case is reported in *Fac. Coll. (Mor.* p. 15,609.) The following is Lord KILKERRAN'S note of the opinions of the Judges.

" The questions here stated are chiefly, 1*mo,* Whether the tailyie is effectual,

as it is not recorded; albeit it bears date prior to the act 1685. And the argument for the creditor urged on this special ground, that no infeftment had followed on it,—nay, that it had not been out of the hands of the granter till long after the act of Parliament 1685.

"*2do, Esto,* The tailyie effectual, though not recorded, as it was of date prior to the act 1685, whether the Earl is not liable, as otherwise representing his predecessor, in respect that his service, *cum beneficio,* is void, or not recorded in the several shires wherein the lands lye. And, *2dly,* That the service was of date prior to the giving in of the inventories.

"*December* 14, 1758.—The Lords found that the tailyie in question ought to have been recorded, and not having been recorded, it is not effectual against a creditor. Had a question been stated on the general point, how far the act 1685 was to be understood to require the registration of tailyies that had been completed by infeftment before the date of the act, it appeared to be the opinion of the plurality that the act 1685 did not require the registration of such anterior entails, though I was one of those who thought it did, as was also *Kaimes, Colston, &c.* but indeed there was no occasion to determine it, for though where there are more points in a cause, the Lords determine the whole points, nor can they refuse to do so in justice to the parties, yet still they only determine points that are in the case; whereas this general point was not a point in the cause, and as many of the Lords who thought the registration not necessary of a tailyie, completed by infeftment before the act, thought the tailyie in question was to be taken as a tailyie made after the act, as being to be considered as no earlier made than it was completed by seasine; on the vote put, in general, whether the tailyie in question needed to be recorded, it by a considerable majority carried as above against the opinion of the President."

The following is Lord Kilkerran's note of the opinion delivered by himself.

"The questions in this case are two: *First,* a very general one. Whether the act of Parliament 1685, which statutes and declares that such tailyies only shall be allowed, where the original tailyie shall have been once produced before the Lords of Session judicially, and such particulars as are in the act mentioned recorded in the particular register thereby appointed, I say, whether the statute declaring this is to be understood only of tailyies that were to be made thereafter, or if it also respects tailyies that were made prior to the statute.

"And the *second* question is, on the supposal that this part of the statute is to be understood to respect such tailyies only as were to be made after this statute; Whether the tailyie in question can be considered as a tailyie made prior to the act, or if it ought not rather be considered as a tailyie made after the act of Parliament, as it was no complete deed till infeftment followed on it, and which did not follow on it till nigh four years after the date of the act of Parliament.

"These are the two questions.

"And with respect to the first and general point, the more I think of it the more I incline to think that the statute is to be understood to relate as well to tailyies that were made before the statute as to such as were to be made after it.

"When I say this, I am sensible of the great weight which lies on the other side, from that opinion which your Lordships have given upon this point, on this and former occasions; but I own when I sit here to give my opinion upon the construction of an act of Parliament, I am bound, in conscience, to give my own

opinion, not pre-occupied by the opinion of another; however I may prefer his judgment to mine, unless it be also my own opinion, and much less to be

and to this I may also add, what was yesterday said by the honourable gentlemen on the floor, that some great lawyers that had come before us would appear to be of a different opinion, as they did not so much as plead the point which I now propose to maintain, though there was fair occasion for it; that noble Lords, the heads of great families, who had tailyied their estates, had no such notion; I say I am sensible, for these reasons, of the great weight which lies in the opposite scale; and, therefore, must give my opinion with diffidence; and, therefore, it is with the greatest diffidence that I throw out what occurs to me on the subject.

" One thing I may be allowed to say, That there was the like reason for the statute having required the registration of tailyies made before the statute, as there was for its requiring the registration of such tailyies as were to be made after it, which was no other than this, That the lieges might be at a certainty, and might easily discover with whom they were in safety to contract; and when the legislature had in view, by this new devised record, to put the lieges in absolute safety, one cannot easily believe that they would have made half work of it, that they would have provided for the security of creditors or purchasers against tailyies that were to be made, and left them to the same uncertainty as before, with respect to tailyies already made, if it was in the power of the legislature to secure them against the one, as well as against the other, consistent with the principles of law. And, therefore, it appears to me to be a fair consequence that such ought to be the construction of the act, as meant to secure creditors against the one as well as the other, if the words can bear it, and that there be nothing adversary to that construction in the principles of law.

" Now, that the words can bear it, let them speak for themselves. It is always declared that such tailyies only shall be allowed, &c. Such tailyies is, in other words, no other tailyies shall be allowed. Where can be the doubt but that the words bear it ? Nay, the labouring oar lies on those who maintain this not to be the meaning of the words. Sensible of this, it is said that this were to give the statute a retrospect.

" But, says the defender, these words, however general, can only be understood to respect tailyies that were to be made for thereafter; for to understand them otherwise, were to give a statute a retrospect by construction, which the common principles of law will not admit, except where such retrospect is expressly declared.

" But, in my apprehension, the maxim is misapplied, for when the act is supposed to require that tailyies made before the statute, however *effectual* at the time they were made, shall, in order to their remaining effectual, be put upon the new record appointed by the statute, that is by no means giving the statute a retrospect, but only requiring a new additional quality or condition, without which the tailyie cannot remain effectual, which to require, is by no means repugnant to any principle or rule of law; and the same charge lies against the act 1690, which is admitted to extend to tailyies made before the act 1685, as well as to tailyies made after it.

" It may be true that, taking the law in this sense, it is put in the power of an heir of entail to disappoint the will of the donor, by keeping the tailyie in his

pocket; but this observation can go no length with any body, when it must be admitted, that in whatever sense this statute is taken on the present question, it is left in the power of any heir of tailyie to defeat the tailyie when he pleases; and that is by serving, and not inserting the clauses in his retour, and against which there is no check provided by the statute.

"And whereas notice is taken of these words with which the statute is introduced, that it shall be lawful to his Majesty's subjects to make tailyies, as if that intended to say that the act had no reference at all to tailyies already made, this is carrying the matter too far, for at that rate we shall be left to argue on the import and efficacy of prior tailyies on the common law, as if this act had never been made, which I do not think will be pretended, nor would it be much to the defender's advantage were such construction put upon the act.

"It remains only to notice the decisions of this Court on this question; as to which I shall only say, that the only one which has occurred in my time, is that of *Humbie*, about a twelvemonth ago; and as to that, I believe it may be true that there was an interlocutor in that case repelling that objection for the heirs of entail, that the tailyie was not recorded in the register of tailyies, as being of date before the statute. But one thing I may say, that hardly can be a decision on which less weight falls to be laid, because it was quite immaterial in that case whether the tailyie was recorded or not; there was another substantial ground on which the creditors prevailed, that there was no clause in the tailyie resolutive of the contravener's right; and so little notice was taken of the objection for the heirs, that the tailyie was not registrate, that if my memory serves me right, though some gave it as their opinion that the statute comprehended tailyies before the act, there was no vote on the question; and indeed judgment was given on this ground, that it was taken for granted that the Lords had given the like judgment in the case of *Kinnaird*, and in the case of *Borthwick of Crookston*, so that, it was, in effect, to be considered as a settled point; the first of which I am not acquainted with, and as to the last, I am not yet satisfied whether our judgment was not in that case reversed, for that it was affirmed I have not heard it averred; and, therefore, I still lean to think it a point entire for us to judge upon.

"With respect to the second point before your Lordships, supposing the law to stand so, that the statute only respects tailyies made since the statute, whether the tailyie in question is to be held as a tailyie since the statute, as infeftment had not been taken on it till after the statute; and even upon that point, rather incline to think, that till seasine was taken, there was no complete act, and therefore no tailyie in the sense of law.

"And sure the reasoning on the former and general point applies with double force, that the Legislature could never mean to exeem from the necessity of registrating a personal deed lying in a man's pocket.

"I at the same time admit, that such a personal deed would bar a creditor,—but why? Not because it is a tailyie, but because every man who contracts with another ought to know the condition of the person with whom he contracts, and it is no tailyie till infeftment follow on it.

"The words, 'It shall be lawful,' are words directed to the law. It shall henceforth be the law, That, &c. And accordingly, we find more than one judgment of this Court, that the statute respected tailyies prior to its date, as well

as such as should be made thereafter. The judgments I mean are in the case of *Dunipace*, and in the case of *Humbie*, both which tailyies were of date prior to the act 1685.

If the act 1685 had in so many words extended to tailyies made before that time, I deny that it would have comprehended such tailyies which remained a personal deed; for till infeftment followed on it, the act of Parliament did not comprehend it, and if that be true, how can it be maintained that that was a tailyie where no infeftment followed before the act; or in other words, a tailyie made since the 1685, so long as it remains a personal deed without seasine upon it, in the sense of this act of Parliament. This I may with some assurance say, after what was in the last resort found in the case of *Westshiels*, where it was found that personal deeds did not need to be recorded, in other words, a personal deed is not a tailyie.

" Now, if that is true, that a personal deed does not become a tailyie till infeftment follow on it, the consequence is unavoidable, that it becomes only a tailyie from the date of the seasine."

1759. *December* 20. CLERK *against* BUBNER.

THIS case is reported in *Fac. Col.* (*Mor.* 4471.) Lord KILKERRAN'S note of the decision is as follows:—

December 20.—" The Lords adhered; and as to the question, whether the administration is sufficient without confirming, the President said, that the letters of administration were enough without confirmation, which he argued from this, that we had receded from many of our ancient notions; we have found no confirmation necessary of goods in the natural possession of the nighest of kin; we have found a bond of corroboration granted to the nighest of kin effectual; we have found more, that payment to nighest of kin is good without confirmation. But all these things notwithstanding, the Lords found that it was necessary to confirm before extract, for so we have always found, and no argument from what we have done can have any influence on this question, concerning the efficacy of their diligence in another country."