the Lords found, that the purchaser's right could not be affected by this entail; but, in an action at the instance of Margaret Young, the substitute, they found that James Young was obliged to re-employ the price and take the security in terms of the entail, because he had contravened the prohibition not to sell, and, therefore, was liable for reparation of damage to the substitute, in whose favour the prohibition was conceived. But, if the prohibition had been only to alter the order of succession, the Lords were all of opinion that selling was no contravention of that prohibition, the only effect of which was to hinder an alteration of the destination of succession.

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1761. *November* 17. M'KENZIE of REDCASTLE *against* ——.

A GENTLEMAN in the country gave a commission to a certain person to sell some victual for him, which accordingly he did, and took the bills for the price in his own name. After that a creditor of the gentleman arrested both in the hands of the factor, who had sold the victual, and of the buyer who had granted bills to him. In the forthcoming the factor appeared and pleaded that he must have retention, out of the sums in these bills, of a debt which the gentleman owed him; but it carried, by a division of eight to six, that he had no retention. It was admitted, that if the money had been paid to him he would have had retention, even against the arrester; but, as the money was not paid, the majority of the Lords thought there was no subject of retention, because the money was truly due to the constituent, so that if he had sued the debtors in the bills he could have recovered payment from them in competition with the factor; therefore the factor had nothing in his person that could be the subject of retention, neither the money nor the *nomen*; and, besides, Lord Alemore observed, that he had no warrant from his constituent to take the bills in his own name: perhaps, indeed, he had a power to do so, but, by doing so, he could not have a power to create a security to himself, which it does not appear his constituent had any intention to give him.

24th *February* 1762,—This decision altered unanimously.

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1761. *November* 20. LORD NAPIER *against* CAPTAIN LIVINGSTON.

There were here two questions of considerable moment to our feudal system, which were debated among the Lords *in abstracto*, and shall be stated here in the same manner. A lady had a personal right to lands by precept and procuratory unexecuted: these lands held of a subject superior, and she made a strict entail of them, by granting procuratory for resigning them "in favour of herself and husband, and longest liver of them two in liferent and conjunct fee, for her husband's liferent use allenarly, and to A and his heirs male." She died, and A, without making up any titles to her, infeft himself upon the precept in the disposition to

her. The question was, Whether a service was not necessary to make up his titles to the precept and procuratory?

It was ARGUED,—that it was not necessary,—1*st*, because he was a *nominatim* substitute;—2*d*, because he was no substitute at all, but a conjunct institute. As to the first point, the Lords were all of opinion, *dissent. tantum* Kaimes, that though in personal bonds, as being of less moment, it was understood to be law that a *nominatim* substitute needed not make up titles, and though, in one case of an heritable bond, the same had been found, *Lamington* against *Muir*, 26th February 1675; yet, in the case of land property, no substitute can take without a service; and, indeed, if it were otherwise, there would be an end of the progress of our land rights from the dead to the living. Upon the other point the Lords were more divided; and the President and Lord Coalston, from the favour which they thought was due to the purchaser from A, whose right depended upon the event of this question, were inclined to think that A might be considered as conjunct in the fee with the lady; and they thought that the clause in the deed by which the lady reserved to herself a power to dispone, favoured this interpretation. But the rest of the Lords were of another opinion, and would not, upon any conjectures or presumptions, raise up so anomalous a right, and so unusual in the law of Scotland, by which each of the parties must be understood to have had the whole right in his person, so that *partes tantum concursu faciebant*, else the argument will go but to the one half.

The other question proceeded upon the supposition that the precept and procuratory vested in the person of A without service. The lady's disposition to A was a strict entail, and, in the infeftment which A took upon the precept contained in the disposition by the lady's author to her, all the irritancies and prohibitions were engrossed which were contained in the lady's procuratory of resignation. After this he executed the procuratory in the disposition to the lady, which had no clauses irritant, and got a charter of resignation from the subject superior, whereupon he was infeft, and then sold the lands. The question was, Whether the purchaser upon such a right was safe against the next heir of entail?—By this way of making up his titles A had two rights in his person, one to the superiority and the other to the propery; the last was undoubtedly a limited fee, and if his title had stood upon that right singly, it is clear that the purchaser could not have been safe; but what made the doubt was, that he acquired afterwards the right of superiority, which, as the nobler right, all the Lords agreed, absorbed the other; so that the question was, whether he ought not to be considered as having only one right in his person, namely, the charter from the subject superior. Upon the question the Lords divided very much, and it carried, only by the President's casting vote, that the property in the person of A was a limited fee.

If the doctrine of the minority in this case be well founded, there is an easy way of getting free of all entails of lands held of subjects; which is, by purchasing the superiority; for then, the superiority being in fee-simple, and the tailyied property being absorbed in it, the purchaser will be safe, who, as Lord Alemore observed, is obliged to go no farther than the charter and sasine in which he finds the lands without any fetters. But I am of opinion that, in such a case, there are two distinct fees in the person of him who acquires the superiority; one of the superiority, in fee-simple, and the other of the property, in fee-tailyied; which two fees are of such a different nature that they will not unite and consolidate together, at least not

*ipso jure*, for it is a different question what would have been the case if A had made a resignation *ad remanentiam* in his own hands.

Some of the Lords, in this question, carried their odium of entails so far as to think that the heir of entail taking a charter of entailed lands, from any body, without limitations, will enable him to sell: even a forged charter, some of them thought, would do so; and indeed the argument in this case in favour of the purchaser seems to go so far.

20*th July* 1762.—This interlocutor adhered to upon both points by a greater majority.

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1761. *December* 2. ——— *against* ———.

A BANKRUPT made a disposition of his estate to a trustee for behoof of his son, but the disposition was simple and not qualified with any trust, which was declared only by a back-bond, and was for some years latent, till at last it was declared and made public. The creditors of the father now insist in a reduction of the disposition upon the Act 1621. The defence was, the negative prescription; and the question was, From what time the prescription run, whether from the date of the disposition to the trustee, or from the time of the trust being made public?—And the Lords unanimously found that it run from the first period, because in no case is it a good defence against prescription, that the grounds of challenge did not come sooner to knowledge; and in this case the creditors were bound to look after every alienation made by the debtor, and inquire for what cause it was granted.

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1762. *February* 26. CATHARINE CRAIG *against* JAMES WILSON.

[*Faculty Collection, III.* No. 89.]

IN this case the Lords found unanimously that no legacy left in a testament, though made *in liege poustie*, could prejudice the heir's right of relief of moveable debts, any more than the children's *legitim*, or the wife's *jus relictæ*. This was decided upon the authority of Lord Stair, *lib.* 3, *tit.* 4, p. 31, and of a decision, *Lord Colvil* against *Lady Colvil*, 14*th December*, 1664, and of *Marion Henderson* against *Hugh Campbell*, observed by Lord Kaimes in his private collection.

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1762. *June* 23. JEAN FYFE *against* BEAN and FYFE.

IN this case the Lords unanimously found that a bill, signed by a notary, for the acceptor, but without any witnesses, was void and null; because they thought that though in some deeds, such as bills, the subscription of the party himself without witnesses was probative, yet in no case the subscription of a notary, without wit-