

1675. November 18.

OGILVIES against HOME.

The deceased Laird of Aytoun, before he was married, gave a bond to his sisters-uterine, Murie's daughters, to whom his mother was married, bearing him to bind and oblige himself, his heirs of tailzie and provision, and his heirs-male, and any other succeeding him in his lands and estate, (not being of his own body) his executors, and others representing him, to pay to the said sisters £.20,000; whereupon they pursue Jean Home, Aytoun's daughter, to whom he did dispoise his estate, as representing her father, to make payment. The defender alleged absolvitor, because the obligation could not reach her, in respect of the words inserted therein, "not being of his own body," which being *in ablativo absolute posito*, by the common opinion of lawyers import a condition, as if it had borne, that, providing that there had been no heirs of my body. The pursuers answered, That they opposed the clause which was only adjoined unto heirs-male, and so cannot liberate the defender, who is heir of line; *2do*, After the limitation, the clause bears, "executors, and all others representing me," which being posterior, derogates from the prior exception, and makes all representing liable.

The Lords found, That the restriction did not only relate to heirs-male, but to all heirs that were expressed before it, whether heirs of tailzie, provision, male, or others succeeding in the estate, which extends to heirs of line, or lucrative successors by disposition, and therefore assoilzied the defender from all these passive titles; but found that the restriction extended not to the posterior part of the clause; and found the defender liable as executrix or intromitter with moveables, and that the general words, "of others representing," did not derogate from the restriction, being in one clause.

Stair, v. 2. p. 370.

* * * Gosford reports this case:

1675. November 18.—The deceased Laird of Ayton having granted a bond to the Laird of Murie, who was second husband to his mother, bearing him to be obliged, and his heirs of tailzie and provision who should succeed to him in his lands and estate, and his heirs-male and successors to him in his said lands, (not being of his own body) and his executors and any others representing him, to pay to the said four pursuers the sum of 30,000 merks, to be divided amongst them; they did intent action against the said Jean Home, only daughter to the said Laird of Ayton, as heir of line to her father, and against Home of Plenderguest, as heir of tailzie, for payment of the sum. It was alleged for the Lady, That she ought to be assoilzied, because it is clear by the bond, that their father did only oblige his heirs-male or tailzie, not being of his own body, there being a special provision, that in case he should have daughters who should only get portions out of his estate, in that case he did only oblige his other heirs

No. 3.
Effect of a clause in a deed binding the granter himself, his heirs of tailzie and heirs-male.

- No. 3. who should succeed to the estate, to pay the sum of 10,000 merks; so that his daughter, as heir of line, can never be convened for payment of the sum libelled, whether she did succeed to the estate or not, the bond being only obligatory against the heir of tailzie, and not against any heir of his own body. It was replied, That the bond was opposed wherein the Laird of Ayton himself being obliged to pay that sum, by our law, *qui se obligat, hæredes obligat*, and all who represent him, except they be expressly secluded and excepted out of the obligation; neither can that parenthesis, (not being of my own body) seclude his heirs of line, seeing immediately after these words, "his executors, and others representing him," are obliged and made liable, which being general and adjected to the foresaid parenthesis, must be interpreted to include all persons who in law can be liable, or representing him, albeit of his own body, if, by any particular right or disposition from him, they should succeed to the estate, or be served heirs of line, and thereby have right thereto; the clear intention of the granting of the bond being, that if his heirs-male or tailzie should succeed, not being of his own body, that they should only be liable; but, if it be otherwise, that they of his own body should succeed to the estate, they are not at all declared free by the bond, but ought to be comprehended under the general of all others succeeding to him in his estate and fortune. It was replied, That the bond, and whole context thereof was opposed, bearing expressly, that no heirs were to be obliged but such as were not of his own body; and it being inconsistent with that express clause under the word "others," to comprehend the heirs of his own body, who were particularly exeemed; the defender being his only daughter, could never be made liable as heir of line or heir of provision. The Lords did sustain the defence, and assoilzied the daughter as heir of line and as heir of provision, by a particular right from her father; but if she was executrix, or could be made to represent him as having right to heritable bonds, or other rights, as being general heir, they found her liable; for, after serious considering of the conception of the bond, being in the terms foresaid, they were all unanimous, that he did only intend to burden all heirs, who could represent him, excepting heirs of his own body succeeding to his estate; but, if they did represent him by the general subjoined, they were to be liable; as likewise, they found the Laird of Plenderguest, if he should succeed to the estate, would be liable to the debt; but could not decern, because the controversy betwixt him and the Lady was not decided.

Gosford MS. No. 805. p. 505.

1682. *March.*

GORDON *against* ANDREW BRUCE.

- No. 4. Found, That where sums were tailzied to heirs and substitutes, these heirs ought to serve to the last defunct in fee, though no infeftment had ever followed; and that a cognition was not enough.

Harcarse, No. 959. p. 270.