1697. *February* 23.

CHRISTIAN DICKSON, and WILLIAM MAITLAND, now her husband, *against* JANET STEVENSON, and JAMES RICHARDSON, her assignee.

No. 14.
Land were by contract of marriage to be disposed of at the pleasure of the wife, failing children. A son was served heir and infeft, who then died. The mother's attempt to adjudge the fee ineffectual, she being only a conditional institute.

By her first contract of marriage with John Stevenson, he provided his lands and heritages, with his other goods and gear, to himself and her in liferent, and the bairns to be procreate of the said marriage in fee; which failing, he disponed his said lands and heritages to the said Christian Dickson, his spouse, to be disposed of at her pleasure. Of the marriage there was a son, who was served heir and infeft, and then died. The mother claiming the lands as next substitute, adjudged the same from her husband's heirs, on the foresaid clause contained in her contract of marriage; whereof they now raise a reduction, on this reason, that it was not properly a substitution but a conditional fee, failing of bairns; *ita est* that condition did not exist; for there was not only a child, but he was also served and infeft. Answered, There is a difference between the import of these two clauses in law, *liberis non existentibus*, and *liberis deficientibus*; for in the last case, *esto* there were children, yet *quandocunque* they fail without disposing, the next member of the tailzie succeeds; and therefore the existence of a child here, and his being retoured, cannot prejudge the mother's right, seeing he deceased before the mother, and that it was so found in the famous case, the Earl of Dunfermling against the Earl of Callander, No. 7. p. 2941. *voce* CONDITION, and No. 4. p. 4078. *voce* FACULTY; Justice *contra* Stirling, No. 25. p. 4228. *voce* FIAR; and Oswald, No. 9. p. 2948. *voce* CONDITION; and many others; where children surviving, but not to that age at which they could legally dispone, were found to purify the condition, so as the succession devolved to the next substitute. But the Lords having considered these decisions, they found them only in the case of returns of tochers, and substitutions, and not of a conditional disposition, as this here was, otherwise she behoved to enter heir of tailzie, and not summarily adjudge; and therefore they reduced her adjudication *quoad* the fee.

Fol. Dic. v. 2. *p.* 396. *Fountainhall, v.* 1. *p.* 770.

1704. *November* 24.

MRS. ANNE GILMOUR, *against* SIR ALEXANDER GILMOUR of Craigmiller, her Brother.

No. 15.
Effect of a conditional clause of return.

President Gilmour, by his bond of provision, obliged his heirs to pay Mrs. Anne, his daughter, first 10,000 merks, and then 2000 merks more, at her age of fifteen, but with this quality, that if she died before that term of payment, or before year and day after her marriage, in that case, the principal sum should return to his heirs, and the provision expire and be extinct; but so it is, though she be past fifteen, yet she is not married, and so has no right to uplift the principal sum,