1682. *March.* CHARTERS *against* CHARTERS.

No. 5.

Mr. Laurence Charters, Advocate, being obliged in his contract of marriage to employ £.20,000 and all the conquest, in conjunct fee and life-rent to himself and his wife, and to the heirs-male of the marriage in fee; which failing, to his nearest lawful heirs and assignees whatsoever, with this *proviso*, That, in case his other heirs-male shall pay the provisions appointed to the daughters of the first marriage, they, by their acceptation thereof, should be obliged to enter heirs, and denude themselves of the defunct's estate in favours of the heirs-male;—upon this clause, there being a declarator raised at Mr. Laurence's brother's instance, as heir-male, who offered the £.1000 provided to the daughter, and craved that she might enter, and denude in favours of the pursuer as heir of tailzie;

Answered: Here was no constitution of a tailzie by the contract, but a provision to heirs whatsoever, failing heirs of Mr. Laurence's body. 2*do*, The clause imports not an obligement on the heirs-female to renounce and enter, but only, that, in case they received the said sum, they were bound by their acceptation to enter and renounce, and so it is that they would not accept the sum.

Replied: The *proviso* imports a tailzie in favours of heirs-male, not of his own body, which case must be supposed; for an heir-male of his body would exclude the female from being heir at all.

Duplied: *Esto* there had been a provision obliging the daughters to enter heir to their father, yet the brother here having been served heir to the father, they were not bound to serve heir to the brother and denude, &c. there being no constitution of tailzie, as said is.

The Lords sustained the answer and duply for the daughter, and assoilzied from the declarator.

Harcarse, No. 960. *p.* 270.

1697. *January* 6. SIMPSON and HOME *against* The EARL of HOME.

No. 6.
A remote substitute may pursue contravention of a tailzie, where the nearer heir lies by and neglects his right.

Simpson and Home, the nearest of kin of the heretrix of Ayton, and John Binny of Dalvennan, their assignee, against the Earl of Home, for declaring, that he and all descended of him had amitted and tint the right of succeeding as heirs of tailzie to the estate of Ayton; in regard, by an express clause in the tailzie, it is provided, if any of the heirs of tailzie shall succeed to the Earldom of Home, and assume the title, they shall forfeit the right to the estate of Ayton, and it shall go to the next substitute; now the provision of the tailzie running to Mr. Charles and his heirs; which failing, to Mr. William his brother, and his heirs; Mr. Charles falling to be Earl of Home, and accepting thereof, the pursuers contended the right was devolved to them. The first question that arose to the Lords was,

No. 6. If these parties, being remote heirs, could pursue such a process? The Lords sustained their interest, if those who were immediately nearest were silent, and neglected their right. The next vote was, If they had a title to quarrel, whether Charles, now Earl of Home, had not amitted his right? And they found he had, not only as to his right, as first member of the tailzie; but having contravened, he could not come in as heir to his brother William, the next substitute; because, being once secluded *ex proprio facto*, he could never make his right reconvalesce. The *third* point was, If the forfeiture reached not only the contravener himself, but the heirs descended of his body; seeing it is declared, on the first member of the tailzie's contravening, it shall devolve to the next substitute, which is the next branch. The Lords, by plurality, found the heirs of the contravener's body not excluded, seeing the conception of the tailzie did not expressly bear, that he should amit and tyne the right of succession, not only for himself, but also all descended from him, like original sin; but here *noxa caput sequitur*. Many of the Lords preferred the Earl of Home's children on another ground of law, as they who were heirs *designativè*, and nearest agnates to William Home the substitute, and *eo nomine* would exclude the pursuers; but, in regard the former vote determined the point, they did not proceed to this, though many thought it the more solid ground in law; and the two estates might still be kept separate; for how soon as any of them fell to be Earls of Home, they ceased to be Lairds of Ayton, and the next brother or agnate succeeded him; yet this inconveniency emerged, that if my Lord Home's second son were admitted, his father would, as administrator of the law to him, during his minority, have the rents, contrary to the intention of the Laird of Ayton, who made the tailzie; only that was an unavoidable consequence, and was only a temporary right, terminating either with his own life, or his son's majority. Many of the Lords thought, where the contravener lost it, the same infected the whole branch of his descendants, so that it fell to the next substitute in the tailzie. But the plurality carried it on the contrary, that he only forfeited for himself, unless the clause expressly bore not only the exclusion of the transgressor, who, by his contravention, incurred the irritancy, but likewise *nominatim* debarred his line and posterity; as the clause uses to be drawn when that is intended.

Fol. Dic. v. 2. *p.* 435. *Fountainhall, v.* 1. *p.* 750.

1708. *January* 11. GORDON *against* CAMPBELL.

No. 7. The Lords found, That the next heir of tailzie had a sufficient interest to crave that it might be registered, and that judicial transumpts were not enough.

Fol. Dic. v. 2. *p.* 435.

*** This case is No. 24. p. 5787. *voce* HUSBAND and WIFE.