1699. *July* 13.

DAVID HEPBURN of Humbie and His Eldest SON, *against* The COUNTESS of TARRAS and other HEIRS of Tailzie.

No 145.
Provisions to children were to be named by certain persons appointed by the parent. These persons died. The Court took upon them the office.

ADAM HEPBURN, the former Laird, did, in *anno* 1663, make a tailzie of his estate under clauses irritant, but made no definite settlement what should be the constant jointure of the Ladies of the family, nor how much the estate should be burdened with for providing the younger children beside the heir; but, in place thereof, named four or five friends, by whose advice and consent the said jointure and provisions should be determined, and allowing them to name successors to continue the said faculty and trust in their vice after their decease. The friends named are all deceased, without either appointing what the wives or younger bairns should have, or nominating any to succeed them, whereby Humbie finding himself bound up by the tailzie from providing his son's wife, or the younger bairns, he raises a declarator against the next heirs of entail, that seeing the first nomination did no way take effect, and it being no way reasonable that the case should be unprovided for, the thing being now devolved *in arbitrium viri boni*, the Lords behoved to supply that defect, and either make a new nomination, empowering them to settle, or else that the Lords take the nominees' power, and determine what shall be the quota themselves. Though there was no contradictor in the process compearing, yet I thought the affair *officii nobilis*, and fit to be authorized by the whole, and therefore I reported it to the Lords. Some of them thought the power and trust by the tailzie was so personal that it was wholly extinct by the nominees' death, and not in the Lords' power to meddle or supply it. And being asked, How Ladies or younger children shall be provided? They *answered*, That law permitted them to give a terce of the free estate, and they behoved to provide the younger children out of the excresce of what they could yearly spare of the rents of the tailzied estate, (which may hold in opulent fortunes, but not where they are no more but a commensurate aliment to the present heritor possessing,) otherwise if every fiar were allowed to give even small provisions to younger bairns, in four or five generations that would turn such a burden as in the end would absorb and ruin the estate; and though the most of tailzies have a clause for obviating this hazard, that no new provisions be contracted till the former be paid off and discharged, that they be not both as burdens on the estate at once, yet that clause being wanting here, the Lords can no more add it than they can make mens tailzies, or dispose on their properties, either by restricting or enlarging them. Yet the Lords, by a plurality of eight against six or seven, found this power was not so absorbed and extinguished by the former nominees' death, but the same yet remained with them; but did not incline to do it by a new nomination and substitution of others, but rather to appoint what should be the quota, whether a terce or less to the wives, and three or

four years free rent, or a fourth or fifth of the value of the estate, or a lesser proportion, and for that effect ordained a condescendence to be given in, what may be a reasonable provision either for wives or younger children. No 145.

Fol. Dic. v. 1. p. 499. Fountainhall, v. 2. p. 60.

1701. *June* 19. WRIGHT, Petitioner.

No 146.
A factor on a burdened estate asked advice of the Court relative to his management. Refused.

MR ROBERT WRIGHT, factor to the estate of Bruce of Kennet, gave in a bill, representing, that, by the tenants' late delivery of their farm bear, the prices were fallen, so that he could not win to the Sheriff of Clackmannan's fiar (within which shire the lands lay), which was L. 8 Scots, and therefore craved the Lords' warrant to sell it at the best avail, as the markets now rule. This was to get it allowed when he came to fit his accompts; but the Lords thought it not regular to give him any directions in the matter, but left him to his own method; and this course they also take in setting of lands, as in the case of Meik of Leidcassy, who, by bill, shewed that he had 15 bolls of bear, 3 bolls of oats, some turses of straw and capons, as a feu-duty payable to him yearly out of the kirk-lands of Coupar's Grange; and that Souter and Crockat, the heritors, being either dead or bankrupt, the lands had lien lea these two years bygone, none offering to meddle with them; and seeing not only he, but the minister's stipend, and King's cess, and other creditors, were all disappointed by this course, therefore he craved a factor might be put in to set or labour the lands, that their debts might not perish; the Lords considered, if they had not adjudged already, they might do it, and then, by their own right and authority, they might put in a factor; and therefore refused the bill. Likeas, when factors cannot get lands set to the full avail to what it paid formerly, the Lords refuse to interpose their authority, because it is frequently sought with no other design but to give down the rental, that at the roup it may be sold at an unworth to the prejudice of the posterior creditors; and so they are left to act in these things as rational provident men would do, as they will be answerable on their peril.

Fol. Dic. v. 1. p. 499. Fountainhall, v. 2. p. 114.

1705. *January* 6. LESLIE, Petitioner.

No 147.

LESLIE of Balnageith, as assignee by Leslie of Middleton, having right to a bond of 6000 merks due by Sir Patrick Ogilvie of Boyne; and my Lord Seafield having got the gift of his escheat and recognition, Balnageith adjudges for this debt; but when he comes to extract his decreet, he finds no penalty liquidated in his bond, but only the general clause 'with annualrent and penalty,' without specifying what the penalty should be; whereupon he supplicates the