

1709. *January 22.*The EARL of LAUDERDALE *against* The LORD YESTER.

No. 9.

What comprehended under the term "heirs of tailzie."

The Earl of Lauderdale, upon a special retour as heir-male to Charles Earl of Lauderdale his father, and his father's general and special retour as heir-male to John Duke of Lauderdale his brother, pursued John Lord Yester, as charged to enter heir to, or otherwise representing the deceased Mary Marchioness of Tweedale, his mother, to denude of an apprising led against the estate of Dunfermline *in anno* 1653, and conveyed to the Duke in the year 1668, for his relief of cautionery for Charles Earl of Dunfermline, in the year 1648, upon this ground, That the Duke having in the year 1665, and 1666, disposed to the said Marchioness his only child, his honours and estate of Lauderdale, with all other lands and rights whatsoever pertaining and belonging, or that might be known to pertain and belong to him, under reversion to his Grace, and his heirs-male, and of tailzie; and having, upon an order of redemption used by him, obtained a declarator against her; she *in anno* 1676, renounced all right and interest in the estate of Lauderdale, with all rights of lands and others whatsoever pertaining, or which might pertain and belong to the said Duke, in favours of him and his heirs fore-said.

Answered for the defender: *1st*, No process can be sustained at the pursuer's instance, because, the renunciation is only in favours of the Duke's heir-male and of tailzie; and the pursuer cannot subsume, That he is heir of tailzie, as well as heir-male; seeing he produced only a retour as heir in special to his father, and his father's retour as heir-male in general and in special to his brother. Now the defender offers to prove, That the Duke made a tailzie in favours of his brother Earl Charles in life-rent, and to Earl Richard his eldest son in fee; so that no action can proceed at the pursuer's instance till he be served heir to the fiar, or some way connect a title from him. *2d*, *Esto* the pursuer had a sufficient title to found upon the said renunciation, it carries no right to the apprising in question; because, the Duke had no right to it when he made the dispositions to his daughter; and the renunciation, being only granted in obedience to a decret of declarator of redemption, proceeding upon a faculty reserved in these dispositions, the renunciation could go no further than the rights disposed; and the apprising fell as a separate estate to his daughter, unaffected with the renunciation; for she could not renounce what she had no right to, as not belonging to her father when the disposition was made in her favours; nor could she renounce her hope of succession as heir to her father, who was then alive, and might have had a son.

Replied for the pursuer: *1st*, All heirs-male are heirs of tailzie, seeing they cut off the direct line, especially in contradistinction to the heir of line, with whom the present controversy is managed. The pursuer's father was both heir-male and of tailzie, being served and retoured heir-male to his brother, by virtue of the old infeftments tailzieing the estate and dignity to heirs-male. If there was such a tailzie in favours of Earl Richard, as the defender mentions, it never took effect,

for he was never infeft; besides, it is *jus tertii* to the defender, who nowise represents him; *2do*, The Duke having, for the preservation of his family, made a settlement of his dignity and estate, under the general of all lands and rights pertaining, or that might be known to pertain and belong to him, in favours of his only child, who could not succeed but as heir of line, and to certain heirs of tailzie after her; and having charged her with all debts and legacies that should be resting by him at his decease, and with the fulfilling all contracts and obligations he should then be liable to, in the same manner as if she and her foresaids were to succeed to him as heirs of line, with a clause, That in case of redemption, he and his heirs-male should be bound to relieve his daughter of debts, burdens, and legacies; this was plainly an universal disposition of his succession; and the heir-male was, in the event of redemption, to succeed universally in place of the heir of line; consequently she did renounce, and ought to denude as universally in favours of the pursuer as heir-male by progress; besides, the right of the apprising was even radically in the Duke's person at the date of the disposition; in so far as there was then competent to him as cautioner for the debt in the apprising, a right of relief against the principal debtor's estate of Dunfermline, whereof the posterior acquisition of the apprising was but a consequence. Again, Though the apprising was not in the Duke's person, the time of the dispositions in favours of his daughter, the same was in his person when she renounced; her renunciation being fuller and broader than the disposition, and industriously calculated to comprehend the apprising, or any other heritable right then in his Grace's person.

Duplied for the defender: *1st*, It is not *jus tertii* for him to impugn the pursuer's title; seeing any person serving afterwards heir to Earl Richard, might disquiet him though assoilzied from this process; nor is my Lord Yester concerned, whether the tailzie was completed by infeftment in the person of Richard; it being sufficient that the Duke made a tailzie, which was not altered, and the renunciation is conceived in favours of those he should appoint heirs of tailzie; *2do*, The words, "pertaining, or which might be known to pertain and belong," &c. are but exegetick style to convey all right of the lands then in the Duke's person, or rights thereof that might afterwards accrue to him, and cannot be extended to new rights of lands to be acquired; for, when an universal succession is intended, the disposition carries all that pertain, or shall pertain and belong to the disponent the time of his decease; nor can any argument from the design of parties, be of much weight in this case, seeing rights of lands are not to be made up from strained designs or intentions. Again, The right of relief, which was only *jus obligationis* before the apprising was acquired, can never be understood transmitted to the Lady; for, after the disposition to her, the Duke might have been distressed as cautioner for Dunfermline; and in case of such distress, he might have sought his relief and re-payment, which would not have accrued to his daughter.

The Lords sustained the Earl of Lauderdale's title to pursue; and thereafter, July 20th, 1709, upon advising the extent of the renunciation, found the defender, as charged to enter heir, or otherwise representing the Lady Marchioness his mother,

No. 9. bound to denude of the apprising upon the estate of Dunfermline, in favours of the pursuer.

Forbes, p. 333.

* * See No. 152. p. 12063. *vide* PROCESS. See also APPENDIX.

1710. December 15.

LESLIE and JOHNSTON of Knockhill *against* WILLIAM DICK of Grange.

No. 10.
Tailzied fee
becomes
simple when
it terminates
upon heirs
and assignees.

Mr. William Lauder having lent 20,000 merks to Dick of Grange, he got an heritable bond for it, and was infeft, in 1687. Colonel Sir James Leslie purchases this infeftment of annual-rent, and being likewise creditor to Grange in £.7000 Scots more by infeftment, the two extending to 30,000 merks, he makes a bond of tailzie, whereby he disposes these two annual-rents, and sundry other sums, failing heirs of his own body, in favours of James Dick, his sister's son, and the heirs-male of his body; which failing, to his eldest heir-female, without division, and the heir-male of her body; which failing, to ; which all failing, to himself, his own heirs and assignees; and this under irritant and resolute clauses *de non alienando et non contrahendo debitum*. After Colonel Leslie's death, James Dick, neglecting his uncle's tailzie, enters into a transaction with Captain Robert Leslie, the Colonel's brother, his heir-male and of line, and, on his serving heir, he takes a disposition from the Captain to the Colonel's estate, and particularly to the foresaid 30,000 merks contained in the two infeftments of annual-rent above-mentioned; and being infeft, entered into possession of the lands of Grange in virtue thereof, without regarding the tailzie; and he shortly after this deceasing, his brother William, serving heir to him in these rights, possessed the estate of Grange. Margaret Leslie, only child to Captain Robert, and Andrew Johnston of Knockhill, her husband, conceiving themselves prejudged by this conveyance, raise a declarator against her father, and William Dick, now of Grange, to hear and see it found and declared, that Captain Robert, her father, had forfeited his right, by inverting the order of his brother the Colonel's succession, by neglecting his tailzie, and entering heir of line simply to him, without the burdens inserted in the Colonel's nomination, and thereby the right was devolved to her, as next heir of tailzie, and so she had the only right to her uncle the Colonel's estate, and particularly to these two infeftments of annual-rent upliftable out of the estate of Grange; and, consequently, that William Dick, the present possessor of Grange, had no right thereto. Against this declarator, it was *first* alleged, for Dick of Grange, That she had no title to pursue this action; because, by the 22d act of 1685, introducing tailzies, at least confirming them, the person contravening not only tines and amits the right for himself, but likewise for his heirs and descendants; so that the branch on which she sits being cut off, her right must fall to the ground together with her father's; and so her