1670. *January* 29.

The Laird of RENTOUN, JUSTICE-CLERK *against* HOME, Portioner of Westrestoun.

No 7.
There being a servitude upon a whole abbey prestable to the forester, he having the lands himself, and disponing or excambing the same without reservation of the servitude, the Lords found the lands free thereof.

IN a declarator at the Justice-Clerk's instance, as having right to so many threaves of corn and straw out of each husband-land of the abbay of Coldingham, as heir to —— Ellums, who were foresters to the abbacy; there was a defence proponed for Home, That his lands of Westrestoun were given in excambion with the pursuers predecessors, for certain lands which were a portion of Rentoun, and that without reservation of any such servitude. It was *replied*, That these lands of Rentoun being liable to that servitude before the excambion, *ex natura rei*, the lands of Westrestoun, which were excambed, behoved to be liable to that same servitnde as these lands of Rentoun were.—— THE LORDS having considered the contract of excambion, and charter following thereupon, which did bear, that the pursuers' predecessors, who did excamb these lands of Westrestoun, had disponed the same to be holden blench, *reddendo denarium pro omni alio onere*; and that, when these lands belonged to the Lairds of Rentoun, who were foresters, they could not be liable to that servitude, *quia res sua nemini servit*, they found the allegeance relevant and proven, and therefore assoilzied the defender.

Fol. Dic. v. 1. *p.* 200. *Gosford, MS. p.* 97.

No 8.

1687. *July* 23. ELIES, Supplicant.

MR JOHN ELIES having infeft his son in Elieston, to be holden base of himself, and being now dead, and so his son succeeding also to him as heir of tailzie, and serving himself heir, he doubted how to be infeft, being both superior and vassal, and if he could direct precepts to infeft himself? On a bill given in to the LORDS, they directed precepts to the Sheriff of the shire to infeft him. But thereafter the LORDS found he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority without a sasine.

Fol. Dic. v. 1. *p.* 200. *Fountainhall, v.* 1. *p.* 470.

1736. *February* 4.

No 9.
A wadset, purchased by an heir of entail, the reversion of

CHARLES, EARL of PETERBURROW *against* The CREDITORS of SIR PETER FRASER of Duris.

SIR ALEXANDER FRASER having purchased the estate of Duris, comprehending the lands of Strachan and Culpersheugh, entailed it under the usual prohibitory

No 9.
which made part of the entailed estate, was found affectable for his debts.

and irritant clauses: After his decease, it descended to Sir Peter Frase rhis eldest son, who contracted a great many debts; and, upon his demise, it again devolved to Charles Earl of Peterburrow, as the next heir of entail, who insisted for reducing the debts contracted by Sir Peter, as having no power to charge the estate with any burdens other than what were contained in the tailzie.

The defence offered for the Creditors was, That Sir Peter had an interest in the lands of Strachan and Culpersheugh, subject to no limitations or conditions whatever, which, from the rights produced, was instructed in the following manner, viz. it appeared, that the Earl of Marshall, *anno* 1642, conveyed these lands, by way of proper wadset, to Sir Thomas Burnet of Leys, redeemable upon payment of 57,090 merks, wherein he was publicly infeft; and that the Earl of Marshall's creditors had apprised his estate *anno* 1650, whereby they carried a right, not only to the estate of Duris, but to the reversion of the lands which had been wadset to Sir Thomas Burnet.

Further, it appeared that Sir Alexander Fraser, *anno* 1666, did purchase the estate of Duris, comprehending the above reversion, from the Earl of Marshall's Creditors, with his concurrence, which he entailed in the 1667 and 1669 in manner as above set forth; and likewise, that Sir Alexander had acquired a right to some securities on the said wadset, whereby, when Sir Peter came to succeed to the entailed estate, there remained only outstanding on the wadset the sum of 27,090 merks, which he having paid, obtained a disposition thereto, *anno* 1687, from the heirs of the wadsetter. This right or interest in the wadset, so far as extended to the sum paid by Sir Peter, the Creditors *contended*, was affectable for his debts; seeing, from the above state of the facts, it was plain, that Sir Alexander, at the date of the entail, had no interest in the wadset lands other than a right to redeem; so that the clauses in the entail could not affect any greater interest in the estate, than what belonged to the maker thereof. And the act 1685, the proper basis upon which all entails do stand, refers particularly to lands in the right of the tailzier, at the date of the tailzie. 2*do*, The clauses in the entail are conceived so as to affect what belonged to Sir Alexander himself, being chiefly limitations upon his heirs; wherefore the words can reach no farther than such lands and estate as they were to take by descent from him. 3*tio*, There appears nothing in this case to hinder the wadset-right, acquired by Sir Peter, to go to his heir of line, and the tailzied estate to the heirs of tailzie. And, as he did not extinguish, but take a formal right thereto, differing in substitution from the entail itself, it cannot be construed to give any additional force to the entail; especially as the entailed subjects are not put in a worse condition by the creditors having access to affect this purchase.

For the Earl of Peterburrow, it was *answered*, The nature of a reversion is such, that, when the redeemable right comes to be paid off, the full property is in the reverser; and there is an end of the redeemable burden: So soon, therefore, as Sir Peter paid off the wadset, the full estate was in him, from that time, in the same manner as if it had never been granted; and, in this case par-

No 9. ticularly, as Sir Alexander, when he purchased the reversion, became bound to pay the wadset-money, by relieving the Earl of Marshall of the requisition, the wadset-sum was a debt upon him, part of which he cleared in his own time, excepting the 27,090 merks paid by Sir Peter; and which, by a clause in the tailzie, whereby the heirs are obliged to pay the tailzier's debts, he might have been compelled to pay; of consequence, the payment behoved to operate in extinction of the debt, more especially as he did not keep it up by taking a conveyance to a trustee, but took it directly to himself, the reverser, whereby the estate was as much disburdened of the wadset, as it would have been of any adjudication or heritable bond that he had paid. And, supposing it should be considered as an acquisition, yet, in that view, it as effectually accresced to the estate as if he had purged off any other incumbrance whatsoever; if it were otherwise, several odd consequences would follow. Thus, for instance, all the incumbrances, where the heirs of line and heirs of entail are different, behoved to descend as separate estates, the one to the heirs of line, and the other to the heir of tailzie. In the *next* place, although it is not alleged, that any of the debts were contracted to pay off the wadset; yet it is now pleaded, that they must affect it; because Sir Peter disburdened the heir of entail of so much debt, as the estate is thereby in no worse case than it was at the date of the tailzie. But, at this rate, supposing Sir Peter had paid the debts out of the rents of the estate, as probably he did, and so paid it out of what were the effects of Sir Alexander; yet, nevertheless, it must remain a burden upon the estate against the succeeding heirs of entail; the consequence whereof would be, that no entailed estate, where there are any debts affecting it at the time of the entail, could ever be effectually disburdened; for, if an heir of entail thinks fit to extinguish debts affecting the estate, if he does not make a new entail; then either he, or any subsequent heir, at the distance of whatever period, (for this matter admits of no prescription), might charge the estate with as much debt as did affect it the time of the entail; because, according to the Creditors' reasoning, such contractions do not put the estate in a worse case than it was at the date of the tailzie; if this be law, it would make a record of debts, that affect a tailzied estate at the date thereof, full as useful and necessary as the record of entails.

Replied for the Creditors; The clause in the entail, whereby Sir Peter was bound to pay the tailzier's debts, cannot be extended to the redeeming of wadsets, which are proper heritable estates in the wadsetters possessing the lands, by virtue of redeemable dispositions; which, though they contain a clause of requisition, yet, until that is made, they cannot come under the notion of debts. As to what is *urged*, That a wadset is of the nature of an heritable bond or adjudication, which, if Sir Peter had paid, could not thereafter remain a burden on the entailed estate, being extinguished *confusione*; it is *answered*, *Imo*, That it cannot be admitted, even supposing the purchase had been of an heritable debt granted by the maker of the entail, that this heritable bond, convey-

ed to Sir Peter and his heirs or assignees, could not have been affected for his debts; seeing there is no law that declares such acquisition should become *ipso facto* extinguished; especially if a conveyance, and not a discharge, was taken thereto; but when it is considered, that the right in question is a proper wadset, and not an heritable bond or adjudication, the argument is still stronger; as these are extinguishable by possession, which a proper wadset is not; nor is there the least foundation for presuming that the wadset was paid out of the rents of the estate. 2*do*, It may be true, that, when a person who is debtor acquires a right, it will, in some instances, be extinguished *confusione*; yet, in others, the confusion does only operate a temporary suspension of the effect of their right, *e. g.* if two separate estates are sprung from the same subject, and happen both to centre in one person, this does not itself *eo ipso* sopite the two estates, so as they may not descend thereafter to different heirs, or that one may and the other may not be affectable for the debts of the heir for the time being; nor does it make any difference, that Sir Peter did not take the conveyance in the name of a trustee; seeing it would have belonged to him just as much in that shape, as in the way it was taken; and consequently equally liable to be affected. No 9.

THE LORDS found, that the wadset was affectable by the Creditors to the extent of 27,090 merks.

Fol. Dic. v. 1. *p.* 201. *C. Home, No* 9. *p.* 26.

1736. *July* 6. EDGAR *against* JOHNSTON *alias* MAXWELL.

No 10.
A right may be completed upon any one of two titles competent.

AN estate being disponed to an eldest son in his contract of marriage, and to the heirs-male of his body, which failing, to the heirs-female of his body, the said eldest son, after the father's decease, neglecting to infeft himself upon the disposition in the contract, made up his titles as heir of the investiture; again, after his decease, his son made up his title also as heir of the investiture, and thereupon made a gratuitous conveyance of the estate. The heirs-male of the marriage having failed in him, the heir-female was served heir of provision in general upon the contract of marriage, and thereupon claimed the estate upon this *medium*, that the gratuitous disponee can be in no better situation than the heir general, or the heir of investiture, who would be bound by the deed of his predecessor, granter of the disposition, in the contract of marriage. It was *answered*, That the disposition being in favour of the apparent heir, was absorbed by his making up titles to the estate as heir general; and it would be an useless form to oblige him to infeft himself over again, upon the disposition in the contract, or to oblige his son to serve heir of provision to him in general, in order to carry the provision in the contract, which would not make the estate more amply theirs than it was by their making up titles as heirs of the investiture.—— THE LORDS repelled the allegeance, that the right of the contract of marriage