1748. *July* 23.

Mr CHARLES HAMILTON GORDON *against* Sir JOHN GORDON.

No 96.
The son of an heir female, who, to take an estate, was obliged to bear a certain name and arms, was found not excluded by his mother's not having borne it for a long time, during which she possessed, and himself not having borne it for some time, during which the estate was possessed by another; but was allowed to purge, by bearing that name and arms in future.

THE LORDS having, on the 13th instant, determined, as is observed, No 67. p. 2336., the import of the tailzie of Halcraig, appointed parties procurators to be heard upon the following points, *viz.* 1*st*, How far Sir William Gordon could, after his contract of marriage, make an entail of the lands thereby provided to the heir male of the marriage, under a condition by which he might forfeit the other estate of Halcraig? And, 2*dly*, How far it was yet competent to Sir John, upon his assuming the name of Hamilton, and carrying the arms of Halcraig, to claim the said estate; or, if he was not now excluded and debarred from making such election, and claiming the said estate?

Pleaded on the *second* question for Mr Charles, That Sir John could not now bear the name, and take the estate, but was simply bound to denude. The succession opened to Lady Gordon, who thereupon became bound to carry the name, or denude, neither of which she did; and though it may be said, it would be hard to insist rigorously upon her not immediately taking the name, but supposing she had been pursued within a moderate time, she might then have saved the estate, by fulfilling the condition; yet her continuing to bear another name for 34 years, was plainly subjecting herself to the other alternative of denuding; at least, as she was bound to bear the name, or denude, and had never done either during her life, there was nothing remained after that, but for the succeeding heir to denude in favour of the next branch; besides, Sir John himself, since his mother's death, had never taken the name, although Mr Charles had, since the death of their father, possessed the estate, and, during all the time of this dependence, he had not offered to bear it, but insisted that he might enjoy the estate without that condition; so that, having chosen not to call himself Hamilton, he ought to quit the estate to Mr Charles, who took that name.

Pleaded for Sir John, Lady Gordon was not obliged to bear the name, or denude, but might chuse to irritate, by doing neither. There are no actions competent upon tailzies for performing conditions; for who ever heard of an action to bear name and arms; but declarators of irritancy for failures; and if Lady Gordon has irritated, Mr Charles can take no benefit by it, as she irritated for all her descendents; but she did not irritate; and, indeed, this tailzie is so conceived, as to be impossible to be enforced, as there is no time fixed within which the heir is obliged to comply with the condition, but may do it at any time before death; and after the death of an heir, the same faculty is competent to the next; at least, Lady Gordon could not irritate during Sir William's life, whom she predeceased, as she had it not in her power to bear what name she pleased, but behoved to be determined by him; and, indeed,

No 96. it is only on Sir William's death that any obligation can arise, as the obligation of denuding is suspended upon her eldest son's succeeding to a greater paternal estate, so as to make it inconvenient for him to change his name, which can only appear on his succeeding to his father's estate. *Lastly*, If Lady Gordon did irritate, it cannot be declared against him, who does not represent her, as she made up no titles, he having succeeded directly to his uncle, John Hamilton. Sir John himself has not irritated, as he has not yet made up titles to the estate; and an heir apparent cannot irritate, especially when not admitted to the possession, which Charles excludes him from; and it were hard to infer, that he has lost the estate of Milton, for not bearing the name in these circumstances, when it is yet a question, whether his taking it will not forfeit him of the estate of Invergordon; if any thing can be made of it, when this is once determined, he will know how to behave.

For Mr Charles, An apparent heir cannot forfeit an estate, but may the right of succeeding to it; and an irritancy, incurred by one heir, may be declared against the next, as was found in the case of Denholm of Westshields, No 94. p. 7275.; which case was reversed, not on the incompetency of the declarator, but on the irritancy's not being incurred; Lady Gordon's irritancy may, therefore, be declared against Sir John, and will be available to Charles; for it were absurd to interpret the forfeiture for descendents, to the prejudice of that descendent to whom the right is given, which is secured by that forfeiture: But, without insisting on the irritancy, there is in Charles a right to have the denuding, and, on that right, an action must arise; my Lady not having taken the name, was obliged to denude, and Sir John is now obliged, not as representing her, but as called to the estate; for the obligation is on all the heirs, and was purified by my Lady and Sir William's election, to whom, indeed, rather than my Lady, this was committed by the tailzier; for the husband of the heir female was to change his name, and that of his heir, only if it were not inconvenient, from his being to leave him a preferable estate, and Sir William has made the election.

Sir John has chosen for himself, having never, since the commencement of this action, so much as signified he will comply with the condition.

For Sir John, If my Lady Gordon had denuded, it must have been to him, for he was then second son, and there is no obligation in the tailzie on the second son becoming eldest again to denude.

For Mr Charles, The obligation of denuding is on all on whom the other obligation rests, of bearing the name and arms, the one or other must be complied with.

With regard to the other question, How far it was in Sir William's power to tailzie his own estate, the LORDS ordered condescendences to be given in of his circumstances at his death, as the contract of marriage left it in his power to do rational deeds, and from them the rationality would partly be inferred;

but no determination is yet given, the parties having a view of an amicable accommodation. No 96.

THE LORDS found, that Sir John Gordon was not barred from claiming the estate of Halcraig, upon his yet assuming the name and arms of Hamilton of Halcraig.

Fol. Dic. v. 3. p. 338. D. Falconer, v. 1. No. 281. p. 376.

1749. *July* 18. CHARTERIS of Amisfield *against* The KING'S ADVOCATE.

No 97.
A gentleman conveyed his estate to the second son of a relation, with the burden of a sum to the eldest son, provided the father did not interfere in the education of the second. Upon the forfeiture of the estate of the eldest for rebellion, the second claimed the sum from the Crown, as having become his, in consequence of his father having incurred the irritancy of interfering in his education. The claim was dismissed.

COLONEL FRANCIS CHARTERIS of Amisfield disponed his whole estate, which he should have at his death, to his grandson, Francis Wemyss, afterwards called Charteris, second son to the Earl of Wemyss, burdened with L. 10,000 Sterling, to the Lord Elcho, the Earl's eldest son; which he appointed at the said term to be laid out for purchasing the most preferable debts due by the family of Wemyss, the rights of which to be taken in favour of the said Lord Elcho, and his heirs in the honour and estate of Wemyss, descended of the Colonel's body. He also named tutors and curators to his heir, and appointed four of them, to wit, Mrs Helen Swinton, his spouse, the Duke of Argyle, Earl of Islay, and Sir Robert Walpole, or any three of them, his Lady *sine qua non*, to have the sole direction and ordering of his education; or of that of any other of his grandchildren who might succeed to him in his estate; and the appointing of with whom they should reside, or travel; and that neither the Earl of Wemyss, nor any of their tutors or curators, except those named, nor any other person, should have any power or voice therein: And in case the Earl of Wemyss should interpose and endeavour to hinder the same, that the Lord Elcho should have no right to the said sum. And in another place, that in case the Earl, or any other person, should claim any power or voice in the education of his said heirs, or should interpose and hinder the same, that the Lord Elcho should lose any right or title to the said sum. He also appointed certain sums to be annually allowed for the aliment and education of his heirs of tailzie, which he proportioned to the age they should be of, increasing as they advanced in it.

Colonel Charteris died, leaving his heir in minority; during which the money was paid by his tutors and curators, part of it upon a decreet of the Court of Session, and properly applied for purchasing in the family debts. In corroboration of which, the Earl granted to Lord Elcho an heritable bond for L. 10,000.

Lord Elcho engaged in the late rebellion, and was attainted; and Mr Charteris, within four years after his majority, revoked the payment, and raised a reduction thereof; and on Elcho's estate being surveyed, entered his claim therefor, at least, that he was creditor upon it for the sums paid; for that the