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" costs and expenses of the said appellant be, and " the same is hereby reversed, and that so much of " the said several interlocutors as is not hereby re- " versed, or altered, be, and the same is hereby af- " firmed."

For Appellant, *W. Murray, Al. Lockhart.*
For Respondents, *R. Craigie, C. Erskine.*

THOMAS WATSON, Trustee for the HEIR of HAMILTON of Redhouse and CREDITORS, - - } *Appellant;*

THOMAS GLASS, *et alii,* - - *Respondents.*

5 *December*, 1744.

TAILZIE.—PROVISION TO HEIRS AND CHILDREN.—CLAUSE.—Under a clause in an entail binding the heirs male of tailzie and provision, to pay a certain sum " to the daughters and heirs " female " of the entailer,—the entailer's daughter was found entitled to the provision, although not his heir, a son of his having succeeded to the estate.

COSTS.—£50 given to Respondents.

[Elchies *voce* Provision to Heirs, No. 7; C. Home, No. 237; Fol. Dict. III. 124; Mor. Dict. 2306.]

No. 73. HAMILTON of Redhouse, by his contract of marriage, was bound to take the titles of his estate to himself and his spouse in liferent, and to the heirs of the marriage in fee. He afterwards executed an entail of his estate in favour of James Hamilton, his son, and the heirs male of his body, whom failing, the other heirs male of his own body, (with

other substitutions in favour of collateral heirs male,) provided always that in case there should be daughters and heirs female procreate of his (the entailer's) body, and alive at the time of his death, then the heir male of entail who should succeed by virtue of the entail should be bound to pay to his "said "daughters and heirs female, one or more, the sum "of 10,000 merks, to be equally divided amongst "them."

The entailer died in 1688, leaving issue, James and Helen. Helen was married to Adam Glass; and the respondents were the issue of the marriage.

James succeeded to the estate, but made up no title. Upon his death, George, his son, succeeded, and contracted considerable debts. Several adjudications were led against the estate, and, among others, by the respondents, who, in the process of ranking and sale which ensued, claimed under the above provision in the entail.

Objected by the trustee, that the said provision was effectual only in favour of such daughter as might have claimed under the legal character of "heir female," which character could not belong to Helen Hamilton, her father having left a son who was the heir of the marriage.

Answered, that the 10,000 merks was a portion absolutely payable to the daughters, if there should be any living at the death of the father, and although a real estate limited to "daughters and "heirs female," after a limitation to heirs male of the body, could not vest in a daughter, if she was not also heir, yet such a construction was never put on the same words in a deed relating only to a personal estate or a portion; that the terms of the deed excluded all doubt, for as the personal estate as well as the real was conveyed to "the heirs of

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" tailzie and provision above mentioned," in virtue whereof the son of the entailer had taken both estates, so the obligation to pay the 10,000 merks, being likewise laid on " the heirs male, tailzie and provision above specified," must extend to the lineal as well as the collateral heirs male; lastly, that the sum in question was not excessive, amounting to little more than the mother's marriage portion, whereas, if the objection stated by the trustee were sustained, the daughters would be left entirely unprovided for.

The Lord Ordinary found, (20 July, 1742,) " that, by the conception of the clause in the " tailzie, whereby the heirs were obliged to pay " to the entailer's daughters and heirs female, " one or more, the sum of 10,000 merks, Helen " Hamilton, the only daughter of the maker of the " entail, was entitled to the provision of 10,000 " merks, in the event which happened, of the en- " tailer's own son succeeding to the estate, as well " as she would have been entitled to the said pro- " vision, if the estate had devolved upon the colla- " teral heirs of entail, and therefore repelled the " objection made against the interest produced " for Thomas Glass and his sisters." And the Court adhered.

Entered 14 December, 1743.
Amended 3 February, 1744.

The appeal was brought from the interlocutors of the 20th July, 1742, and others in the cause.

Pleaded for the Appellant:—As the provision of 10,000 merks was given to the daughters of the marriage under the character of heirs female, and in lieu of their right to the estate under the marriage settlement, none can be entitled to the provision to whom both characters do not apply; and as there was a son of the marriage, the character of heir could not apply to the daughter.

The provision was only intended to take place in the event of the succession of a collateral heir male—upon failure of issue male of the marriage,— to the exclusion of the heir female of the marriage; in which case it was reasonable to make a higher provision for daughters, as a compensation for the loss of their right of succession; and this is commonly done in those marriage contracts, by which, upon failure of male issue, the estate is destined to collateral heirs. The father could not have intended to exhaust the estate in favour of his daughter at the expense of his son and heir.

Pleaded for the Respondents:—Where portions are provided in marriage-contracts to daughters, or heirs female, the words "heirs female" are considered as synonymous with "daughters."

By the entail, the heirs male of tailzie and provision are, without any exception, taken bound to pay the provision to the daughters and heirs female, which shows that it was to be payable by a son, as well as by a collateral heir, if there should be any daughters living at the death of the father. Unless so payable, the provision would have been nugatory; for, as it was not a strict entail, it was in the power of the son to have defeated the subsequent substitutions, and of course to have destroyed the possibility of the daughter's obtaining the provision, upon the estate going to a collateral heir.

After hearing counsel, "it is ordered and adjudged, &c. that the said petition and appeal be, "and is hereby dismissed the House, and that the "several interlocutors complained of be, and the "same are hereby affirmed; and it is further ordered that the appellants do pay, or cause to be

Judgment, 5 Dec. 1744.

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" paid to the respondents the sum of L.50 for their " costs in respect of the said appeal."

For Appellant, *A. Hume Campbell, Al. Forrester.*
For Respondents, *Ro. Craigie, A. Murray.*

DAVID COOPER of Newgrange, - *Appellant;*
ALEXANDER HUNTER of Balskelly, *et alii,* - - - - } *Respondents.*

11th December, 1744.

ADJUDICATION.—COUNT AND RECKONING.—A creditor having adjudged the estate of his debtor, and likewise the right to an adjudication which the debtor had led against certain other lands; found that in a question with another adjudger of these last lands, he was bound to account for the rents and profits of the former, into possession of which he had entered in virtue of his degree.

No. 74.

THE estate of Newgrange was adjudged by Dr. Lamb of Balskelly.

Lamb's proper estate (of Balskelly) and also the interest which he had thus acquired in the lands of Newgrange, were afterwards adjudged by four of his creditors.

Newgrange was brought to a judicial sale, and was purchased by one Pyper, and by the decrees of ranking and sale the proportion of the price pay-