

1682. *March.*CHARTERS *against* CHARTERS.

No. 5.

Mr. Laurence Charters, Advocate, being obliged in his contract of marriage to employ £.20,000 and all the conquest, in conjunct fee and life-rent to himself and his wife, and to the heirs-male of the marriage in fee; which failing, to his nearest lawful heirs and assignees whatsoever, with this *proviso*, That, in case his other heirs-male shall pay the provisions appointed to the daughters of the first marriage, they, by their acceptation thereof, should be obliged to enter heirs, and denude themselves of the defunct's estate in favours of the heirs-male;—upon this clause, there being a declarator raised at Mr. Laurence's brother's instance, as heir-male, who offered the £.1000 provided to the daughter, and craved that she might enter, and denude in favours of the pursuer as heir of tailzie;

Answered: Here was no constitution of a tailzie by the contract, but a provision to heirs whatsoever, failing heirs of Mr. Laurence's body. *2do*, The clause imports not an obligation on the heirs-female to renounce and enter, but only, that, in case they received the said sum, they were bound by their acceptation to enter and renounce, and so it is that they would not accept the sum.

Replied: The *proviso* imports a tailzie in favours of heirs-male, not of his own body, which case must be supposed; for an heir-male of his body would exclude the female from being heir at all.

Duplied: *Esto* there had been a provision obliging the daughters to enter heir to their father, yet the brother here having been served heir to the father, they were not bound to serve heir to the brother and denude, &c. there being no constitution of tailzie, as said is.

The Lords sustained the answer and duply for the daughter, and assoilzied from the declarator.

*Harcarse, No. 960. p. 270.*

1697. *January 6.* SIMPSON and HOME *against* The EARL of HOME.

Simpson and Home, the nearest of kin of the heretrix of Ayton, and John Binny of Dalvennan, their assignee, against the Earl of Home, for declaring, that he and all descended of him had amitted and tint the right of succeeding as heirs of tailzie to the estate of Ayton; in regard, by an express clause in the tailzie, it is provided, if any of the heirs of tailzie shall succeed to the Earldom of Home, and assume the title, they shall forfeit the right to the estate of Ayton, and it shall go to the next substitute; now the provision of the tailzie running to Mr. Charles and his heirs; which failing, to Mr. William his brother, and his heirs; Mr. Charles falling to be Earl of Home, and accepting thereof, the pursuers contended the right was devolved to them. The first question that arose to the Lords was,

No. 6.

A remote substitute may pursue contravention of a tailzie, where the nearer heir lies by and neglects his right.