1630. *July* 21. FAIRLIE *against* MAXWELL and FAIRLIE.

No 3.
The heir of line, as creditor to the defunct, may insist directly against the heir of conquest, provided he himself renounce to be heir.

BY contract betwixt umquhile James Fairlie and William Fairlie brethren, every one of them is obliged, that in case they die without heirs of their bodies, the survivor should succeed to the lands and heritage of the deceased; and James being deceast without bairns, William, who was the youngest immediate brother, craves this contract to be registrate against the daughter and heir of umquhile John Fairlie, who was immediate elder brother to the said James, and so who was heir of conquest to him; wherein the LORDS found, that the heir general and of line, needed not to be called in this registration, as use is in all pursuits against heirs of conquest, which are not sustained, except the heir of line be first called, and discust; but it was not found necessary in this pursuit, seeing he himself, who pursued the registration, was that person who would be general heir, and of line, he being the younger brother, and so he could not call himself, because he renounced to be heir to him; therefore the process was sustained at his instance against the eldest brother's daughter, who was heir of conquest; whereas, if he had not renounced, he could not have pursued this action, being heir himself, and so that person who ought to fulfil the contract to himself, whereby it would have been confounded.

Act. *Nicolson et Aiton.* Alt. *Advocatus et Stuart.*

Fol. Dic. v. 1. *p.* 245. *Durie, p.* 533.

1638. *November* 20. PROVOST of STIRLING *against* HEIR of LIVINGSTON.

No 4.
The heir of entail renouncing, has no interest to plead the benefit of discussion.

THE Provost of Stirling, as assignee to Bruce, having obtained decreet against the heir of line of Livingston, as being lawfully charged to enter heir, in which process the heir of tailzie being also convened, as lawfully charged to enter heir, he renounced to be heir, whereupon he was assoilzied, and the other heir of line was decerned; the pursuer thereupon intents process of adjudication against the heir of tailzie, in respect of his said renunciation, wherein he compearing, *alleged* that this process of adjudication should not proceed against him as heir of tailzie, while the heir of line be first discussed, according to the order in such cases. THE LORDS repelled the allegeance, and found the process of adjudication might competently be prosecuted against the heir of tailzie, albeit the heir of line was decerned and not discussed, seeing the heir of tailzie having renounced to be heir, he had no interest to propone this exception, after his renunciation; and the LORDS respected not, where the defender alleged that this defence was *in jure*, and although no party should propone it, yet it was in law inherent in the nature of such processes, to discuss the heir of line first; and the Judge ought to find so, by the consuetude and practique of the realm, although it were not alleged; and albeit the heir of tailzie had renounc-

ed, yet it has ever that inherent with it, that *suo ordine* ilk heir should be sought, and discust in his own room, by a priority and posteriority, as use is, which was repelled. No 4.

Act. ——— Alt. *Nairn.*

Fol. Dic. v. 1. *p.* 246. *Durie, p.* 862.

1662. *February.* FLOYD *against* The DUKE of LENOX.

No 5.

IN an action pursued by one Floyd against the Duke of Lenox, as heir male to his predecessor, the LORDS found no necessity to call and discuss the heir of line, unless it could be made appear that the heir of line had any thing in Scotland to discuss.

Fol. Dic. v. 1. *p.* 246. *Gilmour, No* 35. *p.* 26.

1700. *February* 10. WALLS *against* MAXWEL.

No 6.
A father took a bond to himself, and failing him by decease, to his second son. In an action against the son for payment of a debt due by his father, he was assoilzied, the defunct having both heirs and executors.

AGNES WALLS and her Husband pursue Frederick Maxwel to pay a debt owing by Captain Edward Maxwel his father, on this ground, that the Earl of Nithsdale resting the said Edward L. 1000 Scots, he did take the bond to himself being on life, and to the said Frederick his son, failzieing of himself by decease; and she *contended* this made him liable *passive*, at least heir of provision in that sum, and so bound to pay his debt *quoad valorem*, in so far as the L. 1000 would extend. *Answered*, Such conceptions and substitutions in bonds are generally interpreted to make the father liferenter and the son fiar; but here there could be no representation, neither *in universum jus* nor *quoad* the value, for he was not *alioqui successurus*, but only the second son, and the father left both heirs and executors, and they must be first discussed; and, an heir of provision in a special sum can never be convened but only *in suo gradu et ordine*, after all the nearer heirs are discussed; and whereas, they crave he may denude of this sum in favours of his father's creditors, he is only liable *subsidiarie*, neither have they legally affected it, either by adjudication, if heritable, or confirmation, if moveable, as executors-creditors. I find Dirleton, in his Doubts and Questions, *cap. de feoda pecuniæ et nominum*, thinks the substitute in such a case liable as an heir of provision; but there, he is both the eldest son, and likewise the father reserves an express power to dispone, which being a plain effect of dominion, shews he continues fiar. THE LORDS assoilzied Frederick Maxwel and found him not liable.

Fol. Dic. v. 1. *p.* 245. *Fountainhall, v.* 2. *p.* 87.