

1702. February 10. JEAN WALLACE against SIR THOMAS WALLACE.

THE deceased Sir William Wallace of Craigy, in his contract of marriage with Dame Jean Menzies, daughter to Pitfoddels, provides his estate to his heirs-male; and, in case there shall be only one daughter of that marriage, his heir of tailyie is obliged to pay her £20,000 Scots. This case existing, Jean Wallace, the only child of that marriage, pursues Sir Thomas Wallace her uncle, and the apparent heir-male and of tailyie, as lawfully charged to enter heir, to pay her the foresaid £20,000, with annualrent, after her age of twelve years.

ALLEGED,—No process against him as heir-male, till the heirs of line be discussed; which is the pursuer herself, and her sister Margaret by another marriage; and wherever remoter heirs stand obliged to pay a sum, the lineal heirs are always to be first discussed.

ANSWERED,---The pursuer has already insisted against Margaret, the other co-heir, and got a renunciation from her, and none will say she ought to discuss herself; likeas he ought to condescend upon some discussible subject and estate to which they may fall, else the calling them is sufficient. And he has no prejudice; for he can easily liberate himself, by renouncing to be heir, seeing no other passive title is insisted on; and if he refuse to give in a renunciation, he ought to be liable.

The Lords decerned, unless he would renounce; and found he ought to do it, without any farther discussion of the heirs of line. *Vol. II. Page 144.*

1702. February 10. JAMES SINCLAIR against MURRAY of CLAIRDEN.

MURRAY of Clairden having married the daughter of Murray of Pennyland, she, in her contract of marriage, disposes her father's lands to Clairden, her husband; and he, in contemplation thereof, undertakes the payment of some of her father's debts, and particularly of 2000 merks to Maciver of Lickmellum. James Sinclair, having right by progress to these debts, pursues Clairden for payment. His defence was,—My engagement was mutual, *et intuitu* of a right from my wife to her father's estate of Pennyland; but, *ita est*, I find now that she had no valid nor sufficient right; so that I have raised reduction of the contract *ob causam dati causa non secuta*; for, I having undertaken the debt in contemplation of the estate, and that failing, my obligation *cadit in causam*; and the law says,---*Sive ab initio sine causa promissum est, sive fuit causa promittendi, sed quæ facta vel secuta non est, dicendum est conditioni locum fore*: and Stair, *tit. Conventional Obligations*, observes, That the failure of the mutual cause of a contract operates even against an assignee for an onerous cause to exclude him.

ANSWERED,—Your obligation to pay is simple and absolute, and clogged with no condition or quality of the validity or efficacy of your wife's right, and so you took your hazard; neither is there any thing condescended on, to instruct either the defect of the right or the preferableness of any other thereto; and it was easy for him to abstract and conceal the rights. And, in a decision in the late times, betwixt the *Earl of Lauderdale and the Duchess*, the Lords found