

Dutchess to Lord Charles Scott, his brother, and heirs of his body, whom failing to the Earl, and which had then devolved to him) to pay to Lady Jane L.15,000, with interest and penalty "to the end and in order that Lady Jane may upon these presents charge me to enter heir to Lord Charles," (these are the words) "and that she may thereupon obtain adjudication of the said bond of provision of L.20,000 in payment of the said principal sum of L.15,000 annualrent and penalty, provided that no diligence shall be competent upon these presents against the person, or other estate real or personal of me the said Francis Earl of Dalkeith, except the said provision of L.20,000;" and lastly, the said Lady Jane, by acceptation hereof, renounces all claim of legitim or executry, or others she may have through the death of the Duke of Buccleuch, her father. The Earl of Dalkeith, it appears, did not intend to serve her in the L.20,000 heritable bond, and he died before adjudication was obtained by Lady Jane, and did not even survive Lord Charles three years. But the family estate had been conveyed to him by the Duke his father, and almost all his personal estate, so that his son, the present Duke, was obliged to serve heir to him, and succeeded to him in all his other estates; and by his death, the succession of the 20,000 heritable bond also devolved to him, though it cannot be properly said that he succeeded to his father in it. Lady Jane brought a process against him on the L.15,000 bond, wherein the difficulty was, the obligation to pay was limited to the heirs succeeding to the Earl in the L.20,000 bond, wherein he could have no heir, since he made no title to it; that it was granted only in order to adjudge from him as charged to enter heir to Lord Charles, which is now impossible; and that it was limited not to affect his person, or other estates. The case was reported by Lord Minto; and the Lords thought, that though adjudging from the granter was the method then in view, yet it was not the only end, otherwise there would have been no use for binding heirs; that binding his heirs in the heritable bond must imply either an obligation on him to make up a title to it, so as he might have heirs in it, or otherwise, that such of his heirs as should succeed to it should perform that bond, though he should not make a title to it. Therefore the Lords, in respect that the succession to the heritable bond of L.20,000 has now by the death of the Earl of Dalkeith devolved to the defender his eldest son and heir, and that the defender is heir served and retoured to the Earl, and has succeeded to him in all his other estates, found the defender liable to perform and make good the said bond for L.15,000, and interest thereof, so as effectually to give the pursuer security in the said heritable bond of L.20,000, and infeftment following thereon, for security and payment to her of the said sum of L.15,000, and interest thereof, and penalty if incurred; but not to affect the defender's person, nor his estates real or personal, other than the said heritable bond of L.20,000, and lands therein contained.

No. 11. 1752, July 24. JANET LUNDIE *against* MRS WILSON.

ROBERT LUNDIE of that Ilk became debtor in 1707 in a bond of 400 merks, and died in 1716, without making up titles to his estate, as heir to his mother Sophia; but was infeft in it as heir to his elder brother James, who it seems had been advised that the right of fee was not in his mother, but in the Earl of Melfort, his father, and therefore in 1696 got a gift of his forfeiture, and was infeft under the Great Seal. But after

Robert's death, his son John passed by him and his elder brother, and entered heir to his grandmother Sophia, and was infest, and on his death this defender James was served heir to him. Therefore Mrs Wilson sued him on the act 1695, as heir served to John, who had passed by Robert her debtor, who was not only 3 years but 17 years in possession, and served heir to his grandmother Sophia;—and the cause coming before me, I sustained the passive title, and found the defender liable. But on a reclaiming bill and answers, the Lords altered; and in respect that the Earl of Melfort had the liferent of the estate, found that possession during his life did not subject the next heir passing by Robert; but remitted to hear whether Robert had possessed three years after his death.

No. 12. 1758, Jan. 23. TRAILL *against* FEA.

CLESTRON being married to the apparent-heiress of Buchanan of Sound, who had two old apprisings of the lands of Woodwick and North Ronaldsay, but which had been declared satisfied and paid in a process at Nisbet of Carphin's instance in 1679; but of which decret a reduction had been raised, and as was said, the decret was laid open before 1690; but Carphin still continued in possession. Clestron in 1734, to encourage James Trail to purchase those lands from Carphin, gave him an obligation that he and his wife should grant a trust-bond on which these two apprisings might be adjudged from his wife and him, to convey to him that adjudication, in order to remove that encumbrance, providing that his granting that trust-bond, and conveying the adjudication, should not involve him or his wife in any passive title, as representing the Buchanans of Sound. James Trail, after purchasing the lands from Carphin, died, and Trail of Westness succeeded, who now sues Clestron to perform his obligation, who alleged *inter alia*, that he could not perform it without incurring a passive title, and therefore by the said quality of the bond was not bound. Answered, No passive title would thereby be incurred if the defender's wife did not possess. Replied, If her assignee possess upon that trust-adjudication, it will be the same as if she possessed; at least if in any competition between the creditors of Sound and the pursuer, the pursuer's other rights should be set aside, and he obliged to defend himself by that adjudication, the defender and his wife would be obliged to purge it as a debt of their contracting, or pay the creditor off Sound's debt. However, the Lords repelled the defence, and found him obliged to implement, only with the usual quality, not to affect any other estate. *Me referente*. There were some other defences in the cause; but this one only I thought worth marking; and I own I could hardly come up to the opinion of the Court, and therefore proposed that the bond should contain a quality, that the adjudication on it should not compete with any of the lawful creditors of the Buchanans of Sound. But the Court would not agree.—16th December. But when the interlocutor was extended, the President added another quality to the bond, viz. that it should not infer any passive title as representing the Buchanans of Sound, which possibly may have the same effect with what I proposed, and it was signed in these terms. But 23d January altered this part, and found there was hazard of passive titles, and therefore that they were not bound to give the bond.