No. 26. *ultimus hæres* in prejudice to the heir of line; as also, the wife's tocher, who was mother to the heir of line, being employed for purging of the wadset of 5,000 merks that was upon the lands, it did fall under the clause of the first contract, by which James Tenant the son was obliged to provide the conquest of the heir whatsomever of the marriage. The Lords found, that either in an original feu, or posterior infeftment of tailzie, where the provision is in favour of the heirs-male, and not the heirs whatsomever, that the heir of line cannot succeed, but that the right does devolve to the King as *ultimus hæres;* and found, that the minute being in these terms to infeft in all lands wherein the father was infeft, whereunto he had presently right, were taxative and restrictive, and could not comprehend the lands of Ligtonshiells, wherein the father was not then infeft; and also found, that the obligement in the minute being conceived to obtain himself and his wife infeft in conjunct fee and life-rent, and the heir of the marriage, imported no more but a destination in favours of the heir, and could not hinder, but his father, who was not a contractor in the minute, having thereafter in a contract of marriage, and containing an addition of 1,000 merks of tocher, with several other alterations, provided the lands to the son and the heir-male of his body, which failing to the heirs-male and assignees whatsomever; and albeit, the son was fiar by the conception, yet he was not obliged to answer the destination in favour of the heir-male, neither were the heirs-male obliged to alter the former, albeit the minute had imported an obligement upon the son, not being obliged to fulfill obligements which were inconsistent with, and do evacutate the tailzie or succession: As also found, that albeit the tocher was applied for purging the wadset of 5,000 merks, which did affect the lands of Ligtonshiells, yet that did not make the lands in the person of the son to be conquest, but being provided by the contract of marriage aforesaid, was *præceptio hæreditatis*, so that albeit the son was obliged to provide the conquest to the heirs of the marriage, the obligement of conquest could not comprehend these lands.

Fol. Dic. v. 2. p. 401. Sir P. Home MS. v. 3.

*** Fountainhall's report of this case is No. 11. p. 2949. *voce* CONDITION.

1698. *February* 16. DICK of GRANGE *against* AGNES and JANET DICKS.

No. 27.

Elizabeth Dick, their sister, in her contract of marriage with Mr. Andrew Massie, dispones 8,000 merks, with this quality, that if there be no children of the marriage, he shall life-rent it, but the fee shall appertain to her heirs and executors, and she shall have power to dispose of it by testament, she dying without children, her sisters and brother contend for the fee. Grange alleges it is heritable, because it is to be upon good and sufficient security, which must be understood to be real. The Lords found such inferences not sufficient against the precise con-

ception of the clause making it transmissible by testament, and so moveable. Alleged farther for Grange, That he must have a share by collation, and he is willing to divide with them. Answered, 1*mo*, He can claim no share of the executry, for his father made his election and served heir. 2*do*, You are now a degree remoter, and his aunts must seclude him, there being no representation *in mobilibus*. 3*tio*, You have no inheritance to give in and collate. 4*to*, By the common law collation only takes place *inter liberos*, and not *inter collaterales*. The Lords thought this point deserved a hearing in the Inner-House. No. 27.

Fountainhall, *v.* 1. *p.* 825.

*** See the sequel, No. 11. p. 10326. *voce* PERSONAL and TRANSMISSIBLE.

1698. *November* 16. MRS. MARY HAY *against* ANNA CRAWFORD.

No. 28.
One having a tack of teinds to himself and heirs-male granted a sub-tack thereof, taking the rent payable to himself and heirs whatsomever. *Heirs whatsomever* interpreted to be heirs-male.

Mrs. Mary Hay and Anna Crawford being both creditors to the deceased Mr. Philip Nisbet, they both pursued his representatives for constituting the debt, and both adjudged a tack of teinds which belonged to Mr. Philip; but with this difference, that Anna Crawford, apprehending the right of the tack did fall to Mr. Philip's heir of line, she pursued Mr. Philip's son's daughter, and obtained a decreet *cognitionis causa*, and thereupon adjudged; and Mrs. Mary Hay pursued David Nisbet his brother, and obtained a decreet as lawfully charged to enter heir, whereupon she adjudged.

Whitsomhill, the debtor of the teind-duty, pursues a multiple-poinding against them both; in which it was alleged for Mrs. Mary Hay, That she ought to be preferred; because she produced a tack of teinds of the parish where Whitsomhill's lands lay, in favours of Mr. Philip and his heirs-male, with an adjudication against David Nisbet the heir-male.

It was alleged for Anna Crawford: That she ought to be preferred; because, albeit the tack was originally set to heirs-male, yet the tacksman might alter that destination at his pleasure, and provide the same to any other heir, which he had done, in so far as he had set a sub-tack of the same teinds to Whitsomhill, and taken the tack-duty payable to himself and his heirs whatsomever; and Anna Crawford having adjudged that sub-tack *per expressum*, her diligence was preferable to the diligence against the heir-male.

It was answered: The sub-tack did not alter the destination of the principal tack, because *illud non agebatur;* but the tack-duty was made payable to him and his heirs whatsomever, which *in dubio* is understood the heir of line; yet, where the subject of the tack is distinct to other heirs, heirs whatsomever must be understood the heirs of the principal tack, in the same way as an heritor setting a tack of his lands bearing an obligement to pay the tack-duty to his heirs whatsomever,