

No. 6. If these parties, being remote heirs, could pursue such a process? The Lords sustained their interest, if those who were immediately nearest were silent, and neglected their right. The next vote was, If they had a title to quarrel, whether Charles, now Earl of Home, had not amitted his right? And they found he had, not only as to his right, as first member of the tailzie; but having contravened, he could not come in as heir to his brother William, the next substitute; because, being once secluded *ex proprio facto*, he could never make his right reconvalesce. The *third* point was, If the forfeiture reached not only the contravener himself, but the heirs descended of his body; seeing it is declared, on the first member of the tailzie's contravening, it shall devolve to the next substitute, which is the next branch. The Lords, by plurality, found the heirs of the contravener's body not excluded, seeing the conception of the tailzie did not expressly bear, that he should amit and tyne the right of succession, not only for himself, but also all descended from him, like original sin; but here *noxæ caput sequitur*. Many of the Lords preferred the Earl of Home's children on another ground of law, as they who were heirs *designativè*, and nearest agnates to William Home the substitute, and *eo nomine* would exclude the pursuers; but, in regard the former vote determined the point, they did not proceed to this, though many thought it the more solid ground in law; and the two estates might still be kept separate; for how soon as any of them fell to be Earls of Home, they ceased to be Lairds of Ayton, and the next brother or agnate succeeded him; yet this inconveniency emerged, that if my Lord Home's second son were admitted, his father would, as administrator of the law to him, during his minority, have the rents, contrary to the intention of the Laird of Ayton, who made the tailzie; only that was an unavoidable consequence, and was only a temporary right, terminating either with his own life, or his son's majority. Many of the Lords thought, where the contravener lost it, the same infected the whole branch of his descendants, so that it fell to the next substitute in the tailzie. But the plurality carried it on the contrary, that he only forfeited for himself, unless the clause expressly bore not only the exclusion of the transgressor, who, by his contravention, incurred the irritancy, but likewise *nominatim* debarred his line and posterity; as the clause uses to be drawn when that is intended.

Fol. Dic. v. 2. p. 435. Fountainhall, v. 1. p. 750.

1704. January 11.

GORDON against CAMPBELL.

No. 7.

The Lords found, That the next heir of tailzie had a sufficient interest to crave that it might be registered, and that judicial transumps were not enough.

Fol. Dic. v. 2. p. 435.

* * * This case is No. 24. p. 5787. *voce* HUSBAND and WIFE.