No. 18. 1743, June 10. BINNING *against* EARL OF LAUDERDALE.

THE Lords, 1st, found that the power of Earl Richard was affectable by his creditors on a charge to enter heir; 2dly, That the Duke of Lauderdale's debts cannot be pleaded to exclude the entail; 3dly, That Sir William Sharp's adjudication 1691 against Earl Richard without any charge to enter heir was void and null; 4thly, That the pursuer is *pari passu* with the other two adjudgers in 1694, and therefore that these two adjudications did not exclude. 18th November 1743, Adhered. The President, Strichen, and Kilkerran were for altering as to the first point.

No. 19. 1743, July 15. DRUMMOND of Callendar, *Supplicant.*

FOUND that a substitute in a tailzie could not by a summary petition have a tailzie transmitted from the register to be registrate in the register of tailzies.

No. 20. 1743, July 26. CARMICHAEL of Mauldsly, *Supplicant.*

THE pursuer pursued declarator that by his entail he had power to sell part of his estate for payment of his debts; which coming before me I allowed them a proof of the rental and debt; which they brought, but imperfectly, and insisted that I should lay the case before the Lords to determine the point of law; which I did, and they found that he had no power to sell, and that they could not authorize him. Now he applies for diligence to complete his proof in order to apply to Parliament. But we found that we could not interpose. We gave no deliveranee, but allowed him to withdraw his petition. (See No. 17.)

No. 21. 1743, Dec. 20. LORD MAXWELL *against* TAIT.

THE Lords found that they could not give any judgment upon this question, Whether this purchase would be effectual against the heirs of entail, in respect the entail is not registrate, although the question has been brought before the Court before the sale is executed or the price paid,—until the heirs of entail are brought into the field.

No. 22. 1744, Jan. 25. EARL OF MURRAY *against* ROSS of Balnagowan.

DUN thought that Balnagowan could discharge Mr Francis Stewart of the limitations. Kilkerran differed, but thought there was no evidence of Mr Francis's acceptance. I also differed from Dun, but differed also from Kilkerran, and thought acceptance presumed, that there was no evidence of repudiating, on the contrary evidence of actual acceptance. But I doubted, if there was diligence for the wadset sums, and Mr Francis failed to relieve him, there might not lie reduction *causa non secuta.* The President thought that no man could by any tailzie gratuitously bind himself to his heirs not to alter, that if it is a contract betwixt two parties, or an onerous cause, the parties contractors jointly may always alter. Arniston in the abstract case differed from the President, and thought a man might bind himself as well as his heirs, and in a fee disponed with these conditions the consent of the disponer signifies nothing, and those conditions are qualities of the fee,

and in so far stronger than personal contracts, though even these may be conceived so as the parties cannot alter. He also thought the law implied an acceptance, and here there was actual acceptance, but thought it was a settlement strongly quarrelable on the head of imposition, and that was strong reason for Mr Francis making the transaction 1706, and so was the return, and Mr Francis had power to transact upon that; or 2dly, it may bear the construction that it was intended as a trust. The question was, Whether the two jointly had a power to alter? and it carried they had power, five and President to four. Strichen and Arniston did not vote. Leven retired. Balmerino did not vote. *Pro* were Justice-Clerk, Minto, Drummore, Dun, Monzie. *Con.* were Royston, Kilkerran, Murkle, *et ego.* 17th November 1743.

25th January 1744,—The Lords adhered by a great majority. Arniston gave his opinion that the original settlement in favours of Mr Francis Stewart was a trust, and not intended to be a final settlement, and therefore adhered. Kilkerran was also for adhering because he thought there was no evidence of Mr Francis Stewart's accepting. Murkle was in the Outer-House.

No. 23. 1744, Jan. 27. Case of Dunnipace.

A TAILZIE prohibiting to contract debts and irritating the right of the contravener, but not irritating the debts contracted, the tailzie before the act 1685, therefore needed not to be recorded, but the clauses were inserted in all the charters and sasines. The question was, Whether these debts were void or not? Arniston, Ordinary, had, 2d December, found them void, but 27th January 1744 the Lords by a great majority altered Arniston's interlocutor, and found the debts effectual against the estate. *Con.* were President, Royston, Arniston. I do not know how Strichen voted. Justice-Clerk was absent. Murkle came late and did not vote, but was for adhering.

No. 24. 1744, Jan. 31. Sir Robert Baird *against* M. Lauder.

We unanimously found that a claim for mournings to a relict and aliment to the term was no debt upon an heir of an estate under a strict entail, and adhered to Lord Arniston's interlocutor.

No. 25. 1744, June 19. Laurie *against* Laurie.

One purchased an estate and took the disposition to himself and certain heirs (whereof the first was heir at law) under the restrictions contained in his rights of another estate, which separate rights contained a striet entail with irritant and resolutive clause, but none of them recited in the new right. The substitute pursued the heir first called to take the rights with the irritant and resolutive clauses in the other rights. The Lords found there lies no action at the remote heir's instance against the present heir, but found that by "restrictions" it was intended to be subject to all the limitations and conditions of the other entail.