1758. *February* 14. ERSKINES *against* HAY BALFOUR.

No. 66.

The first member of entail being *disponee*, is not bound by the restrictions laid on *heirs of entail*.

Fac. Coll.

*** This case is No. 58. p. 4406. *voce* FIAR, ABSOLUTE, LIMITED.

1762. *March* 3. LIVINGSTON *against* NAPIER.

No. 67.

One called to the succession as heir substituted to the tailzier, who had died without being infeft, found obliged to take up the succession by general service to the person last infeft.

*** See this case, No. 43. p. 15418. (See APPENDIX).

1769. *November* 24. EDMONSTONE *against* EDMONSTONE and Others.

No. 68.

Edmonstone of Duntreath, who was bound by his contract of marriage to settle his Scotch estate on the heirs-male of the marriage, executed a strict entail, disponing the estate to Archibald Edmonstone his eldest son, and his heirs-male; whom failing, to his second son, &c. with a *proviso*, "That the said Archibald Edmonstone, and the other heirs of entail," shall discharge his debts and provisions to younger children. This entail contained the usual irritant and resolutive clauses; and the mode of expression in all the several obligations was, binding "Archibald Edmonstone, and the other heirs of tailzie." On the entailer's death Archibald brought a declarator against his brother, and the other substitutes in the entail, to have it found, that he, as disponee, and complete fiar, was not subject to any of its limitations. Answered, The powers of the entailer to bind the pursuer are undisputable; and both the general import of the settlement, and the particular expressions used, where his name is always conjoined with those of the other heirs of tailzie, are demonstrative, that it was the intention of the entailer to subject him to the same fetters with the remoter heirs. On the other hand, the pursuer urged, that the omission of his name in the restraining clauses was a proof, that his father did not intend to fetter him; which besides would have been contrary to the faith of the simple destination in the marriage-contract. The Lords found, That in respect it appeared from several clauses in the entail, that the pursuer was comprehended under the description of heir of entail, he was thereby subjected to all the limitations and restrictions of the settlement. But this decision was reversed on appeal; and it was declared, that the appellant

No. 68. being fiar or disponee, and not heir of tailzie, ought not by implication from other parts of the deed of entail to be construed within the prohibitory, irritant, and resolutive clauses laid only upon heirs of tailzie.

Fol. Dic. v. 4. p. 332.

*** This case is No. 59. p. 4409, *voce* FIAR, ABSOLUTE, LIMITED.

1777. *July* 8.

SIR WILLIAM GORDON of GORDONSTONE *against* MRS. LINDSAY HAY and Others.

No. 69.
Another case in which the institute was found not to be bound by the restrictions of the entail.

In 1697, Sir Robert Gordon entailed the barony of Gordonstone in favour of himself in life-rent, and his eldest son Robert, and the heirs-male of his body in fee; whom failing, a series of heirs of tailzie, with the usual prohibitory, irritant, and resolutive clauses; but these were only laid on the heirs of tailzie. Charter and infeftment followed in favour of the entailer and his son, and the entail was recorded. On the entailer's death, his son Sir Robert possessed the estate as fiar under the above deed, and in his marriage-contract with Agnes Maxwell in 1734, he declares, "that as by the present investiture of the estate, it is settled on himself and the heirs-male of his body, which secures it, if not altered, to the heirs of this marriage; so in case it shall be in his power, or he shall hereafter think fit to alter the same, he binds and obliges himself to provide the whole lands therein in favour of himself, and his heirs-male of this or any subsequent marriage; whom failing, to any he shall nominate by a writing under his hand, or in case of no such nomination, then to the heirs-male and of tailzie above mentioned." In 1767, Sir Robert executed a deed of entail of certain other lands called Carbettie, on himself and the same series of heirs as in the entail of Gordonstone executed by his father: But of the same date he executed another deed, which proceeding on the narrative of his powers to alter, declares, that being "resolved to alter the same, in so far as to liberate his second son William Gordon from the whole clauses of said entail; therefore, in case he shall succeed to the entailed estate, he shall be wholly liberated" from all its fetters. In 1771, Sir Robert having altered his intentions, executed a revocation of the entail of Carbettie, and in the same year he granted a disposition of his moveables in favour of Robert his eldest son, in which he expressly declares all former testaments and deeds of settlement made by him to be revoked. He died in 1772, and his eldest son Sir Robert, judging that neither the entail 1697 nor that of Carbettie in 1767 were binding on him, who, as heir-male of the marriage, was entitled to take both estates in fee simple, in virtue of his father's and mother's marriage-contract, expede a general service as heir of provision under that contract, and brought a reduction and declarator for setting aside both the said deeds, against the whole heirs therein named. Sir Robert having died unmarried, his brother Sir William serving heir in general under the contract of marriage, prosecuted the same action. The