ordered and adjudged, that the said William Cullen and Charles Hamilton are conjunctly and severally liable to the appellant in the present action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st January, and also in the whole expenses of process in the said Court of Session; and that the said William Allan was accessory to, and concerned in the said riot and spulzie, and is liable to the appellant in the said action of spulzie for the avail and worth of the whole quantity of meal specified in the said interlocutor of the 21st of January, and also in the whole expenses of this process in the said Court of Session; and it is further ordered and adjudged, that all the other parts of the interlocutors complained of by the said appeal be affirmed; and it is also ordered, that the Court of Session do give the necessary and proper directions for carrying this judgment into execution.

For the Appellant, *Rob. Craigie, W. Murray.*

For the Respondents, *Wm. Nicol, Wm. Hamiltion.*

NOTE.—Unreported in the Court of Session.

[Elchies. Prov. to Heirs, No. 7.]

THOMAS WATSON, W.S., Trustee for, and Adjudger from, the Apparent Heir of Hamilton of Redhouse, and the other Creditors, ... } *Appellants;*

THOMAS GLASS, and the other Children of the deceased Mr Adam Glass and Helen Hamilton, his wife, and Others, . . } *Respondents.*

House of Lords, 5th December 1744.

TAILZIE—CLAUSE, PROVISION TO DAUGHTERS—OBLIGATION—"HEIRS FEMALE."—An entail bound the heirs of entail "to "pay his *daughters and heirs female,*" 10,000 merks. The entailer had only one daughter, and his son, who had succeeded under the entail, having fallen into debt, his trustee objected to pay this provision, on the ground that it was conceived only in favour of such daughter as should succeed as "heir female." Held her entitled to the provision, and affirmed in the House of Lords.

1744.

WATSON, &C. *v.* GLASS, &C.

Captain Thomas Hamilton, on marrying Agnes Birnie, entered into a post-nuptial contract of 27th September 1681, whereby he agreed to infeft the said Agnes Birnie in the estate of Redhouse, for her life, and remainder to the *heirs of the marriage* in fee. By another clause in the said marriage contract, he bound himself to employ the portion agreed to be paid by his wife's father, investing it in land, and to take the securities thereof to himself, and his said spouse, in liferent, and to the heirs of the marriage in fee, which sum, the said Sir Andrew Birnie (his wife's father), thereby obliged himself to pay to the said Captain Thomas Hamilton, if in life, and failing him by decease, to Thomas Hamilton, then his eldest son, if in life; so that, by the express stipulations of this marriage contract, the lands and barony of Redhouse, and the foresaid sum of £444, 8s. 10d. sterling, were limited and secured to the heir of *that marriage*, who should happen to be alive at Captain Hamilton's death; and however the onerous debts contracted by Thomas Hamilton might have affected this fee, so limited and secured, yet no gratuitous voluntary deeds could prejudge the heir of the marriage, of the benefit of the succession, which he claimed as creditor, by the said contract of marriage.

In 1687, Captain Hamilton being anxious to preserve these lands in the male line, executed a bond of tailzie, limiting the succession of these lands, "in favour of James Hamilton, his "son, and heirs male of his body. Remainder to the other "heirs male procreate, or to be procreated of his body. "Remainder to George Hamilton, his brother-german, and "the heirs male of his body. Remainder to Captain Hamil-"ton, his own nearest heirs and assigns whatsoever. Pro-"vided always, that, in case there should be *daughters and* "*heirs female*, the heirs of tailzie should be bound and obliged "to pay his *daughters and heirs female*, one or more, the sum "of 10,000 merks to be equally divided.

Captain Hamilton died in 1688, leaving a widow, a son, James Hamilton, and a daughter, Helen, who was married to Mr Adam Glass.

The estate was much encumbered with debt, when James his son succeeded; and among these was an adjudication led in name of Helen Hamilton, for security and payment of the said sum of 10,000 merks.

A ranking and sale of the estate having been brought, the creditors objected to the debt of Helen Hamilton, on the ground that, by the tailzie 1687, the provision of 10,000

merks *to daughters and heirs female*, was obviously meant and intended to become effectual in favour of such daughter only as could claim under the legal character and description of heirs female, which was not applicable to Helen Hamilton, so long as her father left a son who was the heir of the marriage.

The respondents answered, that though the character of heir female was not properly applicable to Helen Hamilton, their mother, yet, as the sum of 10,000 merks was intended as a provision for the daughters of that marriage, who were thereby become creditors upon the estate, the respondents were, in right of their said mother (the only daughter of that marriage), well entitled to the provision, there being no other provision made for daughters; and that this clause was inserted in the tailzie 1687, with a view and intention, that in all events, whether the estate and other subjects thereby secured to heirs male, should remain with issue male of Captain Hamilton's own body, or go over to the collateral heir male, in prejudice of the *daughters and heirs female*, such daughter, or daughters, should effectually be secure of this sum.

The Lord Ordinary pronounced this interlocutor: "Find, June 15, 1743.
"that by the conception of the clause in the tailzie, whereby
"the heirs of entail were obliged to pay the tailzier's daugh-
"ters, and heirs female, one or more, the sum of 10,000
"merks, Helen Hamilton, the only daughter of the maker of
"the entail, was entitled to the provision of 10,000 merks, in
"the event, which happened, of the tailzier's own son suc-
"ceeding to the estate, as well as she would have been en-
"titled to the said provision, if the estate had devolved upon
"the collateral heirs of entail; and, therefore, repelled the
"objection made to the interest produced for Thomas Glass
"and his sisters." On representation, his Lordship adhered. Nov. 26, 1743.
On two several reclaiming petitions to the Court, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

After hearing counsel,

It was ordered and adjudged by the Lords Spiritual and Temporal, in Parliament assembled, that the appeal be dismissed, and that the interlocutors complained of be, and the same are, hereby affirmed, with £50 costs.

1744.

WATSON, &c. *v.* GLASS, &c.

For the Appellants, *A. Home Campbell, Al. Forrester.*

For the Respondents, *Robt. Craigie, W. Murray.*

NOTE.—Lord Elchies has the following note in regard to this case:—"An obligement in a tailzie in case there shall be daughters, and heirs female, procreate of the maker's body, alive at his death, obliging his heirs male and of tailzie, to pay his daughter, and heirs female, 10,000 merks; the question was, Whether that obligation took place where the tailzier's own son succeeded to him—whether he was bound to his sister for this 10,000 merks, since she was not an heir female, since the son was the sole heir. By our interlocutor of 15th June last, we found her entitled to 10,000 merks. Arniston owned that, at first, he was against the interlocutor, but now he is for it; and said, that providing the 8000 merks, the tocher, and the other moveables in the same way with the estate, that greatly moved him; and observed, that in money provisions in marriage contracts, 'daughters' and 'heirs 'female,' are often used to signify daughters, though there were sons; and upon the question we adhered."—*Vide* Elchies, vol. ii., p. 372.

[Elchies. Proof No. 9. Fraser's Domestic Relations, Vol. I., p. 208.]

1751.

COUNTESS OF STRATHMORE *v.* FORBES, &c.

COUNTESS OF STRATHMORE, . . . *Appellant;*

GEORGE FORBES, sometime Factor and Steward to the said Countess, and SUSAN-JANET-EMILIA FORBES, an Infant, lawful daughter of the said George Forbes, by the said Countess, his wife, . . . } *Respondents.*

House of Lords, 20th March 1751.

MARRIAGE—COHABITATION—PROOF.—A declarator of marriage and legitimation was brought by the respondent, Forbes, founding upon marriage celebrated and performed in Scotland, by some clergyman unknown; and founding, also, on cohabitation in Scotland, and also cohabitation as man and wife in Holland. Held him entitled to a proof of the marriage, and also of the cohabitation as man and wife in Scotland, but not of the cohabitation in Holland. On advocation of this judgment of the Commissaries, the Court remitted to them to allow a proof of the marriage in Scotland, and of the cohabitation in Holland, as