

not serve; but allowed Hallchester's brieves to go on; who was not only heir of tailyie by the last destination, but likewise the nearest lineal heir-male, and could serve himself in that manner though there had been no tailyie: but Raeburn may compear at the service, and protest his right may be reserved, in case he prevail in his reduction of the certification and posterior tailyie.

Compearance was likewise made for Ker of Chatto, and Scot of Ancrum, who were descended of old Sir William Scot of Harden by his two daughters; and so were his heirs of line, and to whom, by the first tailyie, L.20,000 Scots was provided, with which sum it was expressly burdened. But the Lords superseded to give answer to their interests till the first of June.

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1710. *June 3.*

ROGER HEPBURN, Petitioner.

MR Roger Hepburn, advocate, being a real creditor to Hepburn of Nunraw, and infest in his lands; and the mill needing reparation,—he gives in a bill to the Lords, representing, he was going to repair the same; but having caused wrights and masons visit the same, they reported that it would require several sorts of timber, which, if bought, would put the heritor, who is minor, to a great expense; and there was timber enough growing on the lands, proper for that use, which, if allowed to be cutted, would save much needless charges: and, therefore, craved the Lords' warrant for that effect. In the arguing, it was thought it behoved to be either planting or policy about the house, or growing in a wood.

As to the *first*,—Whatever an absolute proprietor might do, they would never allow a creditor to deteriorate the land, by touching it. If in a wood, unless it were actually cutting, it could not be allowed, for the stool would be lost: and it was not enough, that it was *silva cædua*, and fit for cutting, unless it were begun to be cut down in hags; and therefore refused the desire of the bill; though it seemed a prejudice to the minor to put him to buy other timber, when he had it of his own, fit for the purpose, on his ground: But the damnifying of the wood prepondered with the Lords, unless it had been fenced and hayned.

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1710. *June 6.* BARCLAY *against* DAVID BARCLAY of TOUGH.

BARCLAY, heir of provision of a second marriage, pursues Mr David Barclay of Tough, for implement.

ALLEGED,—That his being the only bairn of the marriage, was no sufficient title to pursue, unless he had been served.

ANSWERED,—It is offered to be proven, by your oath, that I am the heir of that marriage, and so holden and reputed; which the Ordinary, in the Outer House, had sustained relevant. And the act being extracted, when the Lords came to advise the cause this day, it was thought by some of them, that the being the sole bairn of the marriage was not a legal title to pursue, without a

service as heir of provision : and the first time this was sustained, was in Carnegy of Kinfauns' process, and has not been uniformly so decided since ; especially seeing it is a passive title, and the right of blood is not enough : Yet, in regard it was so found in the Act, the Lords sustained it here, without any farther ; though some thought a cognition by sentence, at the least, necessary.

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1710. *June 9.* HUGH PATERSON *against* WILLIAM GORDON and his CREDITORS.

IN the ranking of the creditors of Balcomy, and dividing the price, Hugh Paterson insisted on this ground, That Mr William Morton, once minister at Leith, was a creditor to Lermonth of Balcomy, both by an infestment of annualrent and a comprising ; and left four daughters : the rights of three, Mr William Gordon acquired ; the fourth disposed her part to Hammond Newby and Elisabeth Herbert her mother, from whom, by progress, Mr Paterson derives right ; and so craves preference *quoad* the fourth part of that comprising.

Objected by Mr William Gordon and his Creditors, That Elisabeth Morton's assignation to Hammond Newby, her step-father and her mother, did only convey her portion-natural in the rights of the lands of Balcomy ; which, by the grammatical signification of the words, can import no more but the disposing her legitim, which will only carry the bygone annualrents of that debt preceding her father's decease, but never convey the principal sum, to the prejudice of her three sisters, the other heirs portioners, to whom her share falls, she having died unmarried. *2do*, As this assignation is merely gratuitous, without any onerous cause, so it is evidently on death-bed, being a disposition of her goods and gear ; and mentioning her very wearing clothes, and the habiliments of her body, without reserving her liferent-use thereof ; which none but a person on death-bed would do. *Stio*, The assignation being to Hammond, her step-father, and Elisabeth Herbert her mother, and their heirs, it is to be presumed the fee was designed to be stated in the mother, whom she would rather gratify than the husband, who was a stranger to her : And so Paterson's right from the husband is *à non habente potestatem*, he not being fiar.

ANSWERED to the *first*,—The dispositive clause running in thir terms, That she assigns all portion-natural due to her, as one of the four heirs-portioners of the estate of Balcomy, with all right she can pretend thereto, will certainly carry her fourth part, both stock and annualrent. As to the *second*,—It was denied that the same was subscribed on death-bed, and they cannot prove it. To the *third*,—Law is plain, that, in all dispositions to a man and his wife, *potior est conditio masculi* ; and whatever presumption may be, where the right is from an ascendant to a descendant, who had the hope of succeeding however, yet it does not hold in rights made by descendants in favour of their parents ; which is the case in hand.

The Lords repelled the objections, and sustained Paterson's right ; but found the second allegiance relevant, that it was granted on death-bed, at which time she could not prejudge her sisters ; and admitted the same to probation.

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