

PROVISION TO HEIRS AND CHILDREN.

No. 1. 1736, July 21. CLERKS *against* ROBIESON.

See Note of No. 4, *voce* MUTUAL CONTRACT.

No. 2. 1738, July 11. CASE OF BARGENY.

WHEN this case was first decided, 16th July 1736, it did not appear to me to be of great difficulty or intricacy, and therefore I marked nothing at that time, though the question carried in favours of Sir Hugh Dalrymple, by the accident that one of those whose opinions were against him was in the chair, for the Court was divided, six to six, viz. for him were Justice-Clerk, Minto, Kilkerran, Tweddale, Murkle, and I. Against him were Royston, Newhall, Haining, Dun, Balmerino, Leven. And the President and Drummore could not vote, because of their relation, grandfather and uncle; and Monzie was *non liquet*; and Strichen absent. But after that interlocutor, the dispute has been argued with much more accuracy, and great labour bestowed to bring precedents and authorities from the Register of Tailzies, the laws of England, &c. which, together with Miss Buchan's compearance for her interest, delayed the decision till this day, in which time the Bench had suffered a considerable alteration by Culloden succeeding the President, and Arniston's succeeding Newhall; and this day both Monzie and Strichen were also present. The first question determined was concerning Sir Hugh's objection to the retour of William Lord Bargeny, upon which alone any pretension Miss Buchan had did depend; and the Lords repelled the objection, that it did not appear to have been extracted out of the Chancery till after Lord William's death; for they found that the retouring it to the Chancery completed the right, and it being found in Chancery, they found presumed its being retoured *debito tempore*, unless evidence were given that it was not retoured till after his death. And the Bench was unanimous in this interlocutor, except the President and Strichen, who doubted. But they found that Sir Hugh Dalrymple was by the conception of the tailzie preferable to Miss Buchan in the succession, (only Justice-Clerk doubted), and in this we all voted, and even Arniston. But in the other part of the competition betwixt Sir Hugh and Sir Alexander Hope, Arniston would not vote, because his niece, Miss Dundas, who is also Sir Alexander's niece, is next in succession after Sir Alexander and his children. And though the Court seemed to think the ground of his declining himself not sufficient, yet he would not give any vote upon this point. There was little arguing on the Bench, it having been so fully argued before both on the Bench and in the papers. And upon the question, the former interlocutor was altered, and Sir Alexander Hope preferred to Sir Hugh in the succession, which happened by just the like accident as the former interlocutor, for including the President we were divided seven to seven; viz. for the interlocutor, Royston, Justice-Clerk, Dun, Balmerino, Monzie, Haining, Leven. Against it were the President, Minto,

Strichen, Kilkerran, Tweddale, Murkle, and I. Drummore could not vote; and Arniston would not.—*N. B.* Justice-Clerk declared the reason of his altering his former opinion to be in consequence of the former interlocutor against Miss Buchan; that he thought the foundation of Sir Hugh's preference to Sir Alexander was, that heirs-female imported the same thing with heirs whatsoever; and if it did, then he thought Miss Buchan preferable to Sir Hugh; but since the Lords, by preferring Sir Hugh to Miss Buchan, had in effect found that these two did not import the same thing, then he thought, as a consequence thereof, that Sir Alexander was preferable to Sir Hugh, 17th January 1738.

ON advising Messrs Buchans reclaiming bill and answers for Sir Hugh Dalrymple and Sir Alexander Hope, (5th July) the Lords adhered to the interlocutor 17th January last preferring Sir Hugh, only Justice-Clerk and Strichen dissented. But as to the competition betwixt Messrs Buchan and Sir Alexander, many of us thought, that in the order of succession settled by the tailzie, as Sir Hugh and his brothers and sisters, and their issue, were preferable to Miss Buchan and the other descendants of Lord William, so we thought she was called before Sir Alexander Hope, as descended of Mrs Nicolas, though he had no present title to the estate. But since Sir Alexander stands preferred by the former judgment, we agreed that he must of consequence be preferred to Miss Buchan. But the President was unwilling to give an express interlocutor preferring her, in case the judgment should be altered, and therefore it was delayed till to-morrow to consider the wording the interlocutor.—(See the Note relative to this case, *voce* RETOUR.)

No. 3. 1739, Jan. 16. WADDELL *against* WADDELL.

A FATHER conveyed his effects to his two children, James and Margery Waddell, equally betwixt them, and failing either of them by decease before marriage or majority to the survivor, their heirs, executors, or assignees. The daughter married, and her husband was said to be very unfrugal, and in hazard of squandering away his wife's means, wherefore the brother, when past the age of 18 years, made a settlement of his half of the succession, which was all in moveables, to his sister in liferent, and her children in fee, and failing children, to certain substitutes, whom he burdened with some legacies, in case the succession should devolve to them. This deed was quarrelled by the sister as *ultra vires*;—and coming of course before me, I reported it without informations; and the question was, Whether the settlement by the father was a simple destination, which, if it was such, might be altered by the son, though minor, by way of testament, since the subject was moveable; or if it implied a limitation on the children not to alter? and it was agreed, that had their substitution been in general to the survivor, it would not have implied any limitation; but the substitution being only failing any of the children before majority or marriage,—the Lords, the 5th current, found that the son having died minor and unmarried, could not disappoint the father's destination; and this day adhered, and refused a reclaiming bill without answers. I own I was at first against the interlocutor, but since it was pronounced, was not for altering. Arniston was not present at first, but was for the interlocutor, as was the President.