children destitute—nor could there be any purpose of establishing an heir-male, properly so called, for perpetuating a family descended from a second marriage of Paul Robertson. Upon these principles the Court found that L.1000 Scots, settled in a second marriage-contract to the heirs of the marriage, did divide among all the children equally, *February* 1727, *M'Doual* against *M'Doual*; and a like construction was put upon a clause in a marriage contract, where the words *heirs-whatsoever* occurred, *13th June* 1760, *Watson, &c.* against *The Younger Children of Robert Scott*. That such was the intention of parties in this case appears from the term of payment being "on their attaining" to majority or marriage. This plainly relates to all the children of the marriage, and cannot be limited to the *heir*, properly so called, of the marriage. The pursuer therefore can have action for no more than one third of the sum in the obligation: the other two-thirds are exigible by his sisters.

It was ANSWERED for the PURSUER,—That the provision to the heirs-male or female of the marriage is plainly taxative to heirs-male, if any such should exist; and, failing heirs-male, to the heirs-female. Had the intention been that all the children should inherit this provision, it would have been conceived to the heirs-whatsoever, or bairns of the marriage, as in the case of *Watson*, or to the heirs of the marriage, as in the case of *M'Doual*. The limitative distinction of heirs-male and heirs-female is inconsistent with such construction.

On the 23d July 1766, "The Lords, in regard there were two other children of the marriage, besides the pursuer, found the defender liable in no more than one-third of the 1000 merks, with interest."

Act. W. Nairne. *Alt.* W. Mackenzie.

OPINIONS.

KENNET. The clause in the marriage-contract gives no more than one-third to the pursuer. When the whole of the clause is taken together, it appears that *or* means *and*.

PITFOUR. Of the same opinion: When the strict meaning of words occasions an ambiguity, the clause must be explained from circumstances. *Or* and *and* imply the same thing, and mean the children, whether male or female.

1766. *July* 23. ANDREW TAIT, Organist in Aberdeen, *against* JOHN SLIGO, Merchant in Aberdeen.

REMOVING.

Not necessary to raise an Action of Removing, or use formal warning 40 days before term of removing, from tenements within borough.

[*Faculty Collection, IV.* 76; *Dictionary* 13,864.]

JOHN Sligo possessed a shop in Aberdeen belonging to Andrew Tait.

Andrew Tait informed Sligo that he was to dispossess him at Whitsunday 1766, and put another in possession of the shop. This he did so early as December 1765. Andrew Tait accordingly set the shop to one Byres, who dealt in the same commodities as Sligo. Sligo took Byres's shop, and made no secret of his being to remove at Whitsunday 1766 from his old shop. Tait, imagining that every thing was adjusted, did not give Sligo any formal warning. Sligo let the shop which had been formerly possessed by Byres, and then resolved to make good his possession of the old shop for another year, on account of his not having been formally warned to remove. Tait applied to the Magistrates of Aberdeen, praying the interposition of their authority for removing Sligo at the term. The Magistrates, having taken a proof of the facts, pronounced the following interlocutor:—"Find sufficient evidence in process that Andrew Tait notified timeously to John Sligo that the shop in question was set to another tenant, and that John Sligo so far accepted of the notification, that he told to some of the witnesses that Andrew Tait had set the shop he possessed to James Byres; but, also, that the defender had actually taken another shop for himself." And therefore they decerned in the removing.

Of this judgment Sligo offered a bill of suspension.

Argument for Sligo, the Suspender:—

Although all the solemnities required by the Act 1555, in removing from rural tenements, are not necessary in removing from burgal tenements, yet even in the latter some forms are necessary. Thus Craig says, lib. 2. Dieg. 9, § 9: *In burgis, sive prædiis urbanis, sufficit si officiarius urbis publicus, mandato balivi instructus, etiam sine scripto,* 40 *dies ante ferias Pentecostis, ad ædem conductam denunciaverit, migrandum esse ei.* To the same purpose Lord Stair speaks, b. 2. tit. 9. § 40. Lord Bankton says, vol. 2, p. 109, § 52:—"It is sufficient that the officer, without any written warrant from a magistrate, but only in virtue of his office, by a verbal order from the heritor, warn the tenant by chalking the most patent door of the dwelling-house forty days before Whitsunday. This chalking of the door must bear some indication of the tenant's being warned, and the officer's name must be marked, and all the solemnities performed before two witnesses." To the same purpose Mr Erskine speaks, b. 2, tit. 6, § 20. Thus also, in a decision quoted by Harcus, tit. Removing, the Court found "that, a malt-kiln and barn being set for a year, and not for a month or quarter, the tenant could not be removed without a preceding warning forty days before the term, more than other tenants could be removed without such due warning." Were there any difficulty as to the question whether warning be requisite in urban tenements, it is removed by the statute 1690, c. 39, which provides "that the legal term of removing, both in borough and landward, shall be the 15th day of May, upon warning forty days preceding the same." And although warnings within burgh have been sustained, when used forty days before the term of removing, although not forty days before Whitsunday, yet there is no example of a removing being sustained where there was neither warning used nor action raised forty days before the term of removing. Were the necessity of a warning within borough once dispensed with, every removing would become an arbitrary question, to be determined upon particular circumstances,—than which nothing can be of worse consequence.

ARGUMENT FOR TAIT, CHARGER :—

It is confessed by the suspender that the Act 1555 does not relate to urban tenements. Why it should have been limited to prædial tenements is obvious. A tenant cannot always provide himself in a farm, but has not the same difficulty in providing himself in a house. In the latter case, therefore, it is sufficient that timeous notification be made to the tenant, without any necessity of a formal warning; and hence the notification may be given forty days prior to the term of removing, whereas in prædial tenements warning must be given forty days prior to Whitsunday, be the term of removing what it will. *24th July* 1623, *Ker* against *Foulis*. It remains then to inquire what sort of notification is required in warnings from urban tenements. This, as not regulated by statute, must be regulated by custom in different burghs. In Edinburgh, the practice of a town's officer's chalking the door has been commonly used. This, it is probable, induced Craig to mention this as a solemnity requisite, and he has been followed by Lord Stair and Lord Bankton. It is, however, to be observed, that Craig holds a verbal warning to be sufficient if given by authority of a magistrate, and that the chalking of the door is only necessary, in case access be not got to the house. "*Sufficit, si ad locum conductæ habitationis denunciatum sit, aut, si nemo adsit, ut signum aliquod denunciationis affigiet.*" Lord Stair says, b. 2, tit. 9, § 40, that warnings within borough "are regulated by the custom of the burgh." He also mentions the command of a magistrate. But here Lord Bankton differs from him, upon authority of a decision mentioned by Forbes, *24th June* 1709, *Barton*, where a verbal order from the proprietor was found sufficient. Lord Bankton further qualifies what he says, by observing "that this form of warning was at first used only in burghs royal, where, by the custom of the burgh, several peculiarities in divers instances are introduced different from the common course of law." From these authorities it appears that warnings within borough are regulated by custom, and that chalking the door is an evidence of the warning, not the solemnity required in warning; and that an officer may, upon the command of the proprietor, verbally warn. To apply these circumstances to the present case, it is certain that, by the custom of Aberdeen, warnings are given verbally. Sligo was warned verbally by the proprietor, which must be as valid as if the proprietor had employed the officer to warn him in the same form: and the proof of the fact of warning is as well established in this case, to have been in Sligo's hearing, as if an officer had chalked his door in his absence.

On the 24th June 1766, Lord Gardenston, Ordinary, refused the bill.

On the 23d July 1766, the Lords, upon advising a reclaiming petition and answers, adhered.

Act. D. Rae. *Alt.* Alex. Elphinstone.

OPINIONS.

KENNET. Sligo made the landlord believe that he was to remove, and therefore his present plea is barred *personali exceptione*.

AUCHINLECK. Warning is as necessary in boroughs as in the country. When the proprietor supposes that the tenant will go away willingly, he uses no warning. If he is mistaken in this supposal, the tenant will sit.

KAIMES. The Act, 1555, relates to rural tenements; matters of in-town remain as formerly. Notification by the landlord is sufficient, more especially as this notification was followed with the circumstance of the tenant taking another shop.

GARDENSTON. From the whole circumstances of the case, Sligo is barred, *personali exceptione*, by reason of his fraud.

COALSTON. The warning of the Act, 1555, is not necessary in urban tenements: some warning, however, is necessary: no law has said how that warning shall be; any notification then is sufficient.

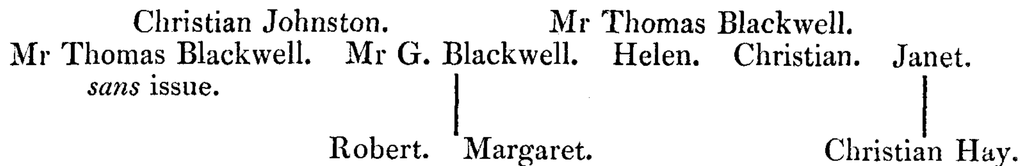
HAILES. Sligo has here attempted to revenge himself both on Tait who set the shop, and on Byres who took it: On Tait by sitting still, and exposing Tait to an action of damages, at the instance of Byres; on Byres, by taking possession of his old shop, and debarring him from the new one. Strong evidence of *mala fides*, and an intention to misuse the law on the part of Sligo.

1766. *July* 24. ROBERT BLACKWELL, only Son of the deceased Mr George Blackwell, Minister of the Gospel at Bathgate, *against* HELEN BLACKWELL, Executrix of the deceased Dr John Johnston, Professor of Medicine in the University of Glasgow.

HEIR AND EXECUTOR.

Relief between Heir and Executor.

DR JOHNSTON had a sister, Christian, married to Mr Thomas Blackwell, Principal of the Marischal College at Aberdeen. His settlements, the subject of controversy, were made in favour of her and certain of her descendants. For understanding the relation they bore to the Doctor and each other, the following genealogical tree of the descendants of Christian Johnston is necessary:



On the 23d November 1747, Dr Johnston executed a deed of settlement, whereby he disponed his lands of Craignaught, &c. to his sister, Christian Johnston, in liferent, and in fee to her son, Mr Thomas Blackwell, his heirs or assignees whatsoever. This settlement contains a general assignation, of all his other heritable subjects which should belong to him at his death, to Mr Thomas Blackwell, and his foresaids, under the burdens, provisions, and reservations therein mentioned. He particularly assigned to him certain adjudications on the estates of Jordanhill and Garnock. Then follows this clause, "Providing always that the said Mr Thomas Blackwell, and the subjects before disponed to him, but not the liferent in favour of my sister, are, and shall be burdened with