

of the half *succedit loco rei* as *surrogatum*, and is due. See the same decision, Haddington, 19th Jan. 1611, *Baillie*.

Sir G. Lockhart contended it was downright nonsense, and contrary to law, to decern for the value, where *ipsa corpora sine rei interitu* could not be paid, and that nothing was due in that case at all. *Vol. I. Page 127.*

See other reports of this case, Dictionary, page 15,275.

1680 and 1681. Sir JOHN MAITLAND and LADY CUNNINGHAM *against* LORD and LADY CARDROSS.

1680. June 8.—Sir William Sharp, keeper of the Signet, demurring to sign a caption at Mr John Maitland and Lady Margaret Cunningham's instance, against Lady Cardross, for exhibition of papers in her hands, because she was clothed with a husband; and this being represented by a bill, the Lords found that could not exeme her, the horning not being for payment of money, but prestation of a deed; the fact of exhibiting being prestable by herself, and in her power; (she having the writs in her husband's absence forth of the country;) and so ought not to decline to obey what is just; and her contempt, delay, and refusal against authority was *quasi maleficium*. In which cases execution may pass against wives. *Vide 7th July, 1680. Vol. I. Page 101.*

July 7.—In Mr John Maitland's action against Lord and Lady Cardross, (June 8, 1680,) the Lords found, where there were two heirs-portioners, the child or descendant of the eldest daughter ought to have the custody of the papers and writs, albeit the Lady Cardross was in the possession, and that we say *in pari causa potior est ratio possidentis*; and appointed her only to get transumpt of them; and reserved to them to debate upon the tailie.

This is no more than what had been decided before, Dury, 17th July 1638, *Denholme*.

The Lords further ordained the expenses of the transumpt to be equally divided betwixt the parties, seeing they had equal interest. But as to the tailyed lands, preferred Cardross as to the writs thereof; he always freeing Lady Margaret, conform to the tailie, of her father and brother's debts.

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July 17.—In Mr John Maitland's general declarator of liferent escheat against Lord Cardross, (21st January last,) Cardross replying *incidenter* on his summons of improbation, which he had depending against the executions of the horning whereupon his escheat was gifted; they DUPLIED, That the execution of the summons of improbation was null, because it bore, some of the defenders were personally apprehended, and some at their dwelling-place; that others were cited at the market-cross of Edinburgh, and pier and shore of Leith, as being out of the kingdom; and was not special in naming and designing who were cited personally, and who at their dwelling-house, &c.; which precludes him from all means of improving the same.

ANSWERED,—It was sufficient to condescend immediately.

This being reported on the 23d July, the Lords found the execution null, and their amending of it, or giving in a formal execution under the messen-

ger's hand before reporting, and offering to abide at it as true, is not sufficient now to sustain the execution, which was once produced, informal and null.

This was judged very strict law. And on the 20th July, betwixt thir same parties, the Lords found no necessity of Mr John Maitland's enrolling in the Inner House; but having appointed it to be heard in presence, that they may call and hear it summarily when they please.

This punctilio, I remember, gave rise to Callender and Almond's appeal against Dumfermline in 1674. Vol. I. Page 108.

1680. July 23.—In Mr John Maitland's action against Cardross, (*vide* 17th instant,) the Lords repelled Cardross's alleageances founded upon the impetrating of the gift of escheat from his Majesty by obreption *expresso mendacio*, or subreption *celata veritate*; because it appeared that there was a competition made by Cardross before the gift was past in Exchequer, and this same objection was made against it, that it was impetrated *viis et modis*; whereon the Exchequer demurred till they wrote to his majesty to know what truth there might be therein; who, by a letter in answer thereto, assured them it was but an unjust clamour, and he disowned any obreption; whereupon the Exchequer past the gift. But some lawyers did not think the obreption sufficiently purged thus, *consulendo et referendo ad principem*, unless intimation had been duly made thereof to Cardross, to the effect he might be in readiness *etiam preces relationis refutatorias principi mittere, si ei videretur*, as the law prescribes, *ll. 1 and 2, C. de Relation.*; which fair method was not used here; so that the very consulting the Prince was part of the tract of the obreption. 2do, It was ALLEGED for Cardross, the denunciation of the horning was null, because it is not at the market-cross where the lands lie, but only where he dwelt. ANSWERED,—That was sufficient to make his escheat fall, as hath been often decided.

The Lords found the tailyied lands, in respect of the conception of the clause of tailyie, behoved only to pay Sir James Stewart of Kirkhill's debt, and that without any recourse or relief against the heir of line, or the executry goods; and so that the heir of line was not liable therefore. Albeit in common law the heir of line and the moveables ought to be discussed before the heir of tailyie.

And they found there could be no *confusio debiti et crediti* in the person of Sir William Stewart the Lady Cardross's brother, (as Cardross alleged,) though he was the same person that was both heir of line and heir of tailyie; but found the existence of the obligation of the clause of tailyie only began when the succession came to divide in two streams and branches, and when the heir of line, Lady Margaret Cunningham, by representing her mother, becomes *diversa persona* from the heir of tailyie, the Lady Cardross, as it now is.

When this cause was voted, there were six of the Lords *non liquet*, *viz.* the Lord Register, Newbyth, Harcous, Pitmedden, Haddo, and —; and so the decision of it was delayed for that day: for, by a custom among the Lords, if there be more *non liquets* than one, they can proceed no further that day, nor determine the cause till the next, that some of those *non liquets* may get leisure to clear themselves.

The next day, being 24th July, they resumed the votes, and the six who were *non liquet* yesterday voted all *negative* against Halton's son, and obstested

God that they followed nothing but their own conscience in it. Though some drew a deeper plot of a schism in the bench from it. There were six Ordinaries voted for Mr Maitland; and Athol's extraordinary vote being also for him, that carried it, and made it seven to six. There was in this cause a declinature given against Newton, as he who had solicited and given partial advice to Halton; but being only subscribed by the Lady Cardross, it was rejected.

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1680. *December 14.*—Sir John Maitland's cause against Cardross and his Lady, (*vide* 17th July 1680,) being advised by the Lords, is decided in Sir John Maitland's favours.

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1681. *January 22.*—In Sir John Maitland's action against Cardross, (14th Dec. 1680,) the Lords inclined to sustain an execution of a summons, though null, as wanting witnesses; because, in fortification thereof, it was offered to be proven, by the parties' oath, that a copy was given them. Though it was alleged executions are only probable *scripto, et non partis juramento*.

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See the concluding part of the report of this case, Dictionary, page 5,523.—See reports of this case, Dictionary, pages 5,522, 12,493, 16,095, 2,449, and 3,038.

1681. *January 29.* GRAY *against* BROWN and OTHERS.

THE Lords refused to extend their late Act of Sederunt, anent what diligence executors-creditors should be liable for, to any cases before the date of that Act; yet, if the Act be perused, it will seem to have a retrospect. But that may be applied to one clause of it, but not to all.

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1681. *February 3.* GILCHRIST *against* ADAM CUNNINGHAM, Macer.

LORD Newbyth found a Scotsman, though out of the kingdom, following his trade, might pursue actions without a factory or mandate to another, seeing he was not absent *animo remanendi*, and factories were only necessary in case of strangers, or Scotchmen absent *animo morandi extra regnum*.

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1681. *February 3.* THOMAS HENDERSON *against* WILLIAM CLARK'S TENANTS.

THOMAS Henderson's action for maills and duties upon an adjudication against William Clark's tenants. Newbyth found an assignation to the maills and duties by Mr William to Mr John Elies for relief of cautionry, though intimated before Henderson's adjudication; yet the said assignation could not compete with his adjudication for terms after the decret of adjudication, the