1684. JAMES WEIR of KIRKFIELD *against* PATRICK MITCHELL.

February 8.—PATRICK Mitchel in Preston having raised brieves to serve himself heir to —— Mitchell his cousin-german, before the bailies of the Canongate, and having led probation on his consanguinity before the inquest; James Weir of Kirkfield, servant to the high-treasurer, having got the gift of the defunct's *ultimus hæres* and bastardy, raises an advocation; and though there were no documents of bastardy, but great evidences of his legitimacy and his contingency of blood, yet it was advocated to the macers, and Saline appointed to be their assessor. *Vide* 10th April 1684. *Vol. I. Page* 268.

April 10.—Patrick Mitchell's service (mentioned 8th February 1684,) being ordained to be led before the macers, and Saline adjoined as their assessor, and this day being set; Weir of Kirkfield, donatar to the defunct's bastardy, stopped it on a bill, pretending that if he had got an incident to cite witnesses on the bastardy, and to prove the inhability and poverty of Mitchell's witnesses, he would make it appear that this party had no blood interest at all, and that the defunct frequently declared he was nothing to him.

On this, they continued the service for two weeks, and granted the donatar a diligence; but at last the service was got expede on a probation of his propinquity. *Vol. I. Page* 295.

1684. *April* 17. HUGH WALLACE *against* HUGH CAMPBELL and HUGH ARCHIBALD.

HUGH Wallace, servitor to Sir William Wallace of Craigie, pursues Hugh Campbell, Cesnock's son, and Mr Hugh Archibald, agent, for calumny and defamation of him, in alleging he had tampered to corrupt and seduce the witnesses against Cesnock. The defence, by way of reconvention, was, *first*, That the condescending on him in the criminal court as the practiser of the witnesses was necessary, being forced thereto by the Justice-General, who repelled the objections of subornation otherwise proponed in general. *2dly*, They had probable grounds to think he had been over active; for some of Cesnock's witnesses deponed that he had drunk with them, and given one of them a little money, and pumped what they could say against Cesnock; and *quævis probabilis causa excusat a calumnia.*

The Lords found both the libel and reconvention relevant; and admitted both to probation. *Vol. I. Page* 295.

1683 *and* 1684. JOHN HAY of MUIRIE *against* BALLEGERNO, POURIE, and OTHER CREDITORS of the last LAIRD of MUIRIE.

See the prior parts of this case, *supra*, page 417.

1683. *March* 13.—SIR John Hay of Muirie, advocate, his recognition

against Powrie and others, (*vide* 5th January 1682,) being advised; the Lords found the infeftment of 14,500 merks was a ground of recognition *quoad suum valorem*, though it was only for relief of cautionry; seeing it was purified by a distress, and they had obtained a decreet of poinding of the ground thereupon, and had entered into possession thereby; and so it was no more an uncertain burden, but was become liquid: as also adhered to their former interlocutor, that an inhibition did not so cut off the posterior contracted debts but it occasioned a recognition, and entered *in computo*. *Vide* 15th and 24th current.

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1683. *March* 15.—BETWEEN Carnegie of Phineven and Sir John Hay, in the declarator of recognition, mentioned the 13th March current; the Lords found it was not the resignation, nor the presenting a signature for getting a charter, that stopped recognition, but only the appending the King's great seal, which perfected the Act.

So that, if there were not as many base infeftments prior to the appending of the seal as absorbed the half of the worth of the ward lands, then this could never fall in recognition; and, however, that it could never be reckoned as one of them: but if there were as many prior as amounted to the half, then the public infeftment did not save it, but it fell with the rest. Castlehill, to make a difference between Phineven's case and Cromarty's interlocutor, (23d Feb. 1683,) distinguished between a base infeftment confirmed by the King,—which he confessed stopped recognition, because the said confirmation passed upon more special notice,—and a public infeftment upon a resignation in the superior's hands, which he accepts of course, and is but *actus incompletus*, as Craig, *Feud. lib.* 3, says, till infeftment be taken.

Though this distinction pleased some of the Lords, yet it was waved.

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1683. *March* 24.—Muirie's recognition, mentioned the 13th current, was this day debated. ALLEGED,—The major part of the whole barony is not alienated. ANSWERED,—The whole lands are not erected into one barony, but only lie contiguous, and the charter bears a dispensation for taking a seasine at one place for all.

2do. ALLEGED,—Sir John Hay, by practising with the witnesses, has proven the rent to be much less than truly it is, to the effect the Lords may think that the major part computed by that rental is alienated by base rights. *Vide* 4th December 1683.

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1683. *December* 4.—In Sir John Hay of Muirie's recognition against Poury, &c., mentioned 24th March 1683; the Lords, having advised the depositions anent the rental, found Sir John had proven that more than the half of the ward-lands were alienated, and so recognosced.

But Gray of Balgerno, one of the creditors, being minor, craved to be reponed against this probation, (for the Lords had refused a conjunct probation of the rental against the king and his donatary;) because her tutors offered to prove the half was not alienated, in so far as there were sundry lands, part of the ward-lands, yet were not in Sir John's rental; which he had either concealed, or held lower than what they truly paid.

ANSWERED,—This is not competent now *post didiscita et publicata testimonia*, and that *ob metum subornationis*; for else this would open a door to perjury and suborning of new witnesses, when parties found they had failed in

their former probation. REPLIED,—Minority and lesion should repone against punctilios of form. *Vol. I. Page* 248.

1684. *February* 23.—The declarator of recognition, at the instance of Sir John Hay of Muiry against Poury, &c. mentioned 4th December 1683, was advised; and the Lords having considered the depositions of the witnesses adduced anent the rental, they find them unclear; and therefore grant commission to Forret, Drumcairn, Blair, and Carse, or any two of them, on the ground of the lands, to reëxamine not only these witnesses, but also gentlemen and others there, who know any thing of the true rent of the controverted lands, if more than the half be truly alienated, so as to make all recognosce; and grant diligence for citing witnesses.

This was a great favour to Poury, after probation led, to make a new Act. *Vide* 14th August 1684. *Vol. I. Page* 274.

1684. *August* 14.—The three Lords, *viz.* Pitmedden, Redford, and Edmonstone, commissioned to take the probation in the recognition, Sir John Hay of Muirie against Poury, &c., as mentioned 23d Feb. 1684, went to the ground of the lands; and whereas each party had above 50 witnesses to prove what was the true rental, the Lords restricted them to 20 the piece; and afterwards, on a communing, persuaded Sir John Hay to give Poury 13,000 merks, and him to accept it; and so they agreed this tedious and expensive plea.

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See many other reports of this case in the Index to the Decisions under *Hay* against *Muirie's Creditors.*

1684. *November* 4. HUGH WALLACE and WILLIAM WALLACE *against* BIGGARS.

THE Lords having advised the probation led by Hugh Wallace and William Wallace, *alias* Biggar, his son, upon the declarator raised by them against Biggars in Ireland, as nearest of kin to the deceased Major John Biggar, to hear it found that the disposition given by the said Major to the pursuer was not *in lecto*, but that he was then *in liege poustie*, and came to kirk and market:

The Lords found it proven that he was then *in legitima potestate*, and therefore declared. *Vol. I. Page* 306.

1684. ABERCROMBIE of Fetternier's Lady and ROBERT SEMPLE *against* SEMPLE of CATHCART.

November 4.—ABERCROMBIE of Fetternier's Lady, as sister to the last Lord Semple, is served heir of line to him; as also Robert Semple, as heir-male, is, by their moyen, served heir-male by two services, one general, the other special; though Semple of Cathcart founded on a tailyie by the last Lord to him, failing heirs of his own body. *Vide* 7th November current.

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