1700. *January* 26. The EARL of DUNDONALD *against* The TOWN of PAISLEY.

[See the prior part of this case, *supra*, page 466.]

THE Lords, in the mutual declarators pursued by the Earl of Dundonald and Town of Paisley, anent the right of the moss, having declared the property in favours of the town, as having prescribed the right; though the charter to them by Abbot Shaw in 1494 only gave them a servitude *et jus lucrandi focalia*, and that the contract betwixt them seemed only relative to the former rights and possession before 1658, which is the date of that contract:—there is a protestation, for remeid of law, to the Parliament, given in by the Earl against this decreet of declarator; which was only signed by Kilmarnock, one of his curators.

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1700. *January* 31. AGNES and WILLIAM PATERSONS *against* BURNET of BARNS.

AGNES and William Patersons being creditors to the deceased Burnet of Barns, they convene this Barns as representing him *passivè*, in so far as he accepted a disposition with the burden of all his debts, and a faculty reserved, in case he should return to the kingdom, or have heirs of his own body; and repeated a reduction thereof as gratuitous and prejudicial to them, who were anterior lawful creditors. And the cause of the disposition being referred to his oath, he deponed he had it for several onerous causes, but shifted to answer that interrogatory, if they were adequate; but he offered to count and reckon, and instruct the onerosity, and, in so far as he fell short, he was content to be liable.

Some were for holding him as confessed, that the cause was not adequate to the value; and that any entering by such a disposition was a kind of heir and successor, and liable personally *in valorem*. Others thought he could not be reached himself; but only the heritage and estate was affected to the creditors, *in quantum* he was *lucratus*, or the value exceeded the onerous cause. But it came not to be decided at this time. *Vol. II. Page* 85.

1700. *February* 15. JEAN MACADAM and DAVID LOGAN *against* QUINTEN MACADAM.

DAVID Logan and Jean Macadam, his wife, pursue Quinten Macadam in Waterhead of Girvan, her brother, for her legitime and bairns' part of gear; which she alleged was the half, seeing there were but two bairns, and the relict was excluded by her provision in her contract-matrimonial.

ALLEGED,---By the same contract, the conquest was provided to the heir-male; and, conform to that destination of succession, his father had disponed to him his haill goods, with the burden of 2000 merks of portion to the said Jean; and

so this being a conveyance and disposal of his haill executry, there was no place for her legitim, but she must be content with the 2000 merks.

ANSWERED,---The disposition reserving the father's liferent, and being only to take effect after his death, it could not prejudge her legitim : and she might repudiate the provision given, or crave it to be made up *per quærelam inofficiosi et supplementum legitimæ.*

REPLIED,---All lawyers agree that a father may not prejudge his bairns of their legitim by testament, legacy, or *donatio mortis causa*, nor any other deed on deathbed, because then exposed to the insinuations of flatteries or threats : but where he settles his estate *inter vivos* and in *liege poustie*, and declares it to be in satisfaction of their legitim, the same is obligatory, and cuts off the legitim, though it be not to take effect till after his death ; seeing he is *dominus et arbiter rei suæ*, and knows best how to distribute his estate among his children ; as was found in the case of *Thomas Wylie* and his bairns : even as much as when he takes a bond to himself in liferent, and to such a child *nominatim* in fee, that substitution will cut off and exclude the legitim, and the other bairns can have no share of that sum.

All agreed that, by no testamentary or deathbed conveyance, he could prejudge the legitim : but some of the Lords thought, that, notwithstanding of the bonds of provision, or dispositions *inter vivos*, if they retained either the liferent or a faculty to revoke and alter, the children, in their option, might either accept, or repudiate and claim their legitim ; but that, if they did transmit it to strangers, or make absolute rights to their children, these would subsist. The point seeming of importance, and to derogate from the paternal power, the Lords ordained the case to be argued in their own presence.

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1700. *February* 7 *and* 20. LORD BOYLE and SIR ADAM GORDON of DALPHOLLY *against* POLLOCK of that ilk and LAWRENCE CRAWFORD of JORDONHILL.

February 7.—I REPORTED David Lord Boyle and Sir Adam Gordon of Dalpholly against Pollock of that ilk and Laurence Crawford of Jordonhill. Kelburn, now Lord Boyle, and Dalpholly having got a tack from the Exchequer of the additional excise on liquors imposed by the Parliament 1693, they gave a subtack of it, in so far as concerned the town of Glasgow, to James Crawford, for £19,000 of tack-duty, for whom Pollock and Jordonhill became cautioners. The sub-tacksman being dead, and about £200 sterling of the tack-duty yet resting, the two principal tacksmen charge the cautioners ; who suspend on this reason, That, beside the excise of ale, there is likewise set to them a duty of two shillings Scots upon every pint of strong waters, whether brewen of malt or not, excepting only what is made of wine ; and subsume that a great quantity of brandy or rum was made, within the time of their tack, of the molosses of the sugar manufactory in Glasgow ; and whereof they having craved the excise-duty, the owners of the manufactory suspended before the Exchequer, and were declared free on this ground, That the manufactory had a privilege and exemption prior to the imposition of this additional excise, and so was neither derogated from nor taken away by the Act 1693 ; so that a considerable branch of the sub-tacks-