

hardships arising from that judgment; but it is better to keep in the road, than to go out of it in search of new principles.

JUSTICE-CLERK. When a great barony belonged to one proprietor, together with a muir possessed by his tenants, I understand that, upon feuing out the barony with parts and pertinents, he feued out as property all that was formerly possessed as farms. When feus were granted of a whole barony, together with a commonty, the feu of the barony carried off the whole common. If this is the rule in whole, why not in part? Upon this principle a great part of the property of the nation depends.

KAIMES. The Act 5, Parliament 16, James VI., is not decisive of the present question. If two men have a common property, neither can dispoſe: but, if one man has 9-10th parts, why may he not dispoſe the whole of that, or a part of that? In the case put, a proprietor is not to be presumed to give away more than a perpetual lease or feu of his lands. The feuar will possess the several lands for ever; but this will make no alteration as to the servitude: it will still be a servitude, perpetual instead of temporary.

On the 30th July and 23d November 1768, the Lords found that the heritors who plead upon infeftments with *parts and pertinents*, and prove possession, are to be considered as joint proprietors; and that, upon a division, they will have the exclusive right of working coal within the limits of the shares of the muir set off to them, unless their rights are burdened with a reservation of coal.

Reporter, Coalston.

Act. R. M'Queen, D. Dalrymple. Alt. A. Lockhart, Sir A. Ferguson.

Diss. Kaimes, Pitfour, Gardenston, Monboddo, Stonefield.

1768. November 23. WILLIAM DOUGLAS of Bridgeton against ALEXANDER ELPHINSTON of Glack.

RES JUDICATA.

If a Court determines upon one ground, when several are offered, and signifies it is therefore unnecessary to examine the rest, a reversal of their judgment is a *Res Judicata* of the general issue between the parties.

[*Faculty Collection, IV. 132; Dictionary, 8649.*]

MONBODDO. I am sorry that the form of our proceedings should have occasioned this difficulty. If the interlocutor had been general, or if every objection had been determined, this question would not have occurred. The words of our judgment determine one point, and find it unnecessary to determine the others. I wish for either a general determination, or for a special judgment in every point. I think we ought to proceed. The decret was extracted, and the appeal was lodged before the expiry of the reclaiming days. What the House

of Peers determined is only one point: It could not in justice determine, nor can it be supposed to have determined, more.

BARJARG. This is a sort of conditional decree. We found upon one point: if our judgment is reversed, the other part of our interlocutor must be reversed also. An extract, upon an interlocutor of this kind, cannot take the cause out of Court totally.

PRESIDENT. My difficulty is here: The interlocutor is final, finding that the freeholders did wrong, &c. The House of Peers decrees the contrary; How can we proceed farther? The fault was in the petitioners: they did not manage their cause right. At the reversal, or even after the reversal, it was competent for them to have applied, and to have got the cause remitted to this Court. This would have been granted of course.

KAIMES. If one of the parties, by appealing, can cut out the other party, he may cut himself out, but he can do no more. I do not put this case upon the inconveniency or hurt arising; because the party hurt might have procured a reservation which would have secured him, and yet neglected it.

PITFOUR. Most appeals are from particular interlocutors. When there is no decerniture, there is no occasion for a remit. The cause comes back of course; but the case is different when the Court closes the chequer. The decree of this Court is, that Mr Elphinstone shall be expunged. The House of Peers says, that he shall stand upon the roll: How can we dispute this? Here there is no inconveniency but what is owing to the neglect of parties: they had a remedy by seeking a remit, but they did not use it.

GARDENSTON. I cannot see either common sense or common justice for holding a decree of the House of Lords to be final, in points not tried. Suppose that there were a reduction upon three grounds;—that the Court of Session determined one point, and reduced the deed, and, at the same time, found it unnecessary to go farther, the deed stands reduced, as long as the decree stands which reduces it; but, if the decree is altered, it becomes necessary to try the other points. This question may be of little moment in a case of a vote; but it is of moment as affording a precedent in the greatest causes.

AUCHINLECK. The intention of the Court was solely to determine one point, but still my difficulty remains. Suppose, in a case of property, there is a reduction on various grounds; one reason of reduction is sustained, and there is no appeal:—May a man, after extracted decret, come to us and desire our judgment upon the points undecided? We are *functi*, and have no power over that particular libel. *Here* is the same thing. The House of Peers did not mean to determine more than we did. But the words stand against our proceeding further, and the parties ought to have taken care of this, and represented that, if there was not a reservation, the cause would be out of Court by the forms of the law of Scotland, in virtue of the extracted decret.

KENNET. It was impossible for the Court, on former occasions, to determine every point in every election cause. This would have multiplied causes beyond measure. I am not moved by the extracted decret; *that* was not voluntary; the petitioner was bound to extract in order to support the judgment. But how can we find that the party ought to be off the roll, when the House of Peers says he shall be on the roll?

On the 10th March 1768, the Lords, having heard the judgment of the House of Peers, refused the petition.

On the 23d November 1768, they adhered.

Act. H. Dundas. *Alt.* D. Rae.

Diss. Kaimes, Gardenston, Barjarg, Hailes, Monboddo.

1768. *June 15, and November 23.* HENRIETTA SINCLAIR *against* CHARLES SINCLAIR of Olrick.

LEGITIM.

1. Effect of a discharge in a contract of marriage upon the wife's right of legitim, or claim upon her father's executry. 2. In what cases the heir is entitled to Legitim.

(*Faculty Collection*, p. 519; *Dictionary*, 8188.)

PITFOUR. A discharge of all claims implies all claims whereof the party discharging can compel performance. The legitim is of this nature; for a father cannot disappoint a child of the legitim: but the stipulation of a discharge of a right of succession is inept; for why should I desire a discharge from a child, of what I may settle without the child's consent? It is true that there sometimes occurs a discharge of all that the child can succeed to, and this is held to be a virtual testament in favour of the other children. In heritage, the heir cannot be prejudiced by exclusion, for it is necessary that another heir be instituted. But there is a difference in moveables; there, exclusion of one child implies an institution of other children. General words of *ask and crave*, will not apply to the dead's part.

GARDENSTON. There are here additional words,—Upon any account whatever. They are such as must have a meaning. A discharge of what could be asked through the husband's death, has been extended to what could be asked through the wife's death.

PITFOUR. There the words were only descriptive and explanatory, and the clause was so complete without them, that it implied all. The Court found it to imply.

MONBODDO. I would give some operation to the general discharge; but a right of future succession must be discharged in express words. This sort of renunciation was quite improbated by the Roman law: It has been admitted, indeed, in modern practice, as appears in Antonius Faber's *Decisiones Sabaudicæ*; but the renunciation must be upon oath. I do not know whether this ever took place with us. The same decisions show, that the renunciation must be in express words; and this, I think, is also the rule with us. Had the words been in and through decease of the father, the case might have been different.

COALSTON. There is a distinction between the case of heritage and that of moveables. An heir cannot effectually renounce, but an executor may. If