

GROUNDS AND WARRANTS.

1771. *July 24.* EARL OF ABERDEEN *against* IRVINE OF DRUM.

IN respect the general and special charges are not the grounds, but warrants of the decreets of adjudication, which the defenders are not obliged to produce after 20 years; therefore find, That the petitioners are not obliged to produce either the said general or special charges, or any other warrants of the decreets; 28th February 1771, Earl of Aberdeen *against* Irvine of Drum.

Adhered to, 24th July 1771, with this addition:—"In respect of the reason mentioned in the former interlocutor, and that general and special charges are not part of the pursuer's title, but produced as evidence of the passive title against the defender; and also, in respect of the former decisions of this Court, and acquiescence of the nation therein, therefore adhere to the former interlocutors concerning said general and special charges.

Fount. I. 675.

HEIRS-PORCIONERS.

1773. *February 16.* CATHCART *against* ROCHEAD.

A *præcipuum* is due to the eldest heir-portioner succeeding *ab intestato*; which the law allows to her on account of her birth and seniority, without paying an equivalent: but where heirs portioners do not succeed *ab intestato*, but as heirs by a special deed, no *præcipuum* is due: the indivisible subjects will go to one, paying a recompense in money to the rest.

Accordingly, the estates of Inverleith and Darnchester, going to four heirs-portioners equally, by and in virtue of a tailyie and settlement made by old Sir James Rothead; and Mr Cathcart of Carbrester, the heir of the eldest heir-portioner, having claimed a *præcipuum*, "The Lords, 16th February 1773, found that, in this case, the claimant, James Cathcart, as in the right of the eldest daughter, is not entitled to a *præcipuum*, as in the case of heirs portioners; and remitted the cause to the Sheriff to proceed accordingly;—reserving to the parties to be heard before him, to whom the mansion-house, offices, garden, and planting about the same shall belong, he paying a recompense."

Against this interlocutor Mr Cathcart having reclaimed, the petition was appointed to be answered. But no answers were given in; the point was settled between them amicably.

In arguing this cause, it was held to be law, that, in the case of heirs-portioners *ab intestato*, a *præcipuum* was due, without an equivalent; *Cowie* against *Cowie*, anno 1707 and 1708; case of *Peadres*, anno 1743; case of *Gadgirth*, anno 1750; and *November 1765, Govan* against *Ireland*.

HEIRS WHATSOEVER.

See case of *Douglass* against *Duke of Hamilton*,—interlocutor in that cause.

1749.

BRODIES against BRODIE.

THOMAS Brodie was proprietor of the lands of Pitgaveny, under ancient settlements in favours of heirs-male, and which originally contained a clause of return to the granter and his heirs-male whatsoever, upon failure of the male descendants of his body. In 1721, Thomas Brodie settled the estate on his three sons, *nominatim*, and the heirs-male *respective* of their bodies; whom failing, on any other heir-male of his own body; whom all failing, on his own nearest lawful heirs and assignees whatsoever. After Thomas's death, and the death of his three sons, without issue,—his daughters, as heirs-portioners to David Brodie their brother, claimed the succession; and Mr Brodie of Lethem also claimed it, contending, that, as this was a male fee in Thomas, his *nearest heirs whatsoever*, in the above settlement, must denote, not his heirs-general, or heirs of line, but his *heirs-male*, who, by the investitures of the estate, were his nearest lawful heirs.

The Lords preferred the heirs of line; for although, where a person possessed of an estate taken to heirs-male, if he purchase a collateral right, and takes it to his heirs whatsoever, such collateral right will notwithstanding go to his heirs-male, not only upon the maxim that *accessorium sequitur principale*, but upon this, that he could not mean to divide them; yet, in all other cases, where a proprietor makes a settlement of his whole estate, and calls his *heirs whatsoever*, these technical words are taken in their proper sense, and will carry it to the heirs of line, more especially where, in the same settlement, he first calls the heirs-male of his body; and, upon their failure, his heirs whatsoever.

The decision in the case of *Rosehall*, between Miss Hamilton, daughter to Sir Hugh, and Hamilton of Dalziel, proceeded on the same principles, of interpreting technical words according to their legal and determined meaning. It is not collected, but is quoted in the information for *Mr Douglas* against *D. Hamilton*, decided December 1776. Miss Hamilton died whilst it depended on a reclaiming petition and answers.