

and many contracts brought in question, and parents called to a petty account, what they did with their children's means, and all be cast open.

The Lords having considered this debate, they thought it was not every lesion that could reponne minors entering into contracts of marriage; but it behoved to be *enormis et immodica*; as Spottiswood observes, *tit. Of Husbands, Fleming* against *Hog*,—that a wife, being minor, was not restored against her disposing her lands to her husband *nomine dotis*, though his fortune and means were unanswerable thereto; and that an exact equality was not necessary: *Vid. supra, Carmichael* against *the Lady Lee and John Sinclair*: And therefore the Lords, by a vote, found, That if enorm lesion were here proven, then the Lady Grange was to be reponed; but did not determine what lesion would be reputed such. Then, by a second vote, they found Grange the husband liable, notwithstanding his wife should be free. Some thought his homologations after the marriage not so valid, they being so recently taken as the next morning, and so still *in æstro amoris*; but that his deeds anterior did bind him, unless he could say that it was told him, If you do not accept of this tocher, the marriage shall be stopt; which was a plain concussion, and more than a *metus reverentialis*. Some asked, What did it signify to restore the wife upon immoderate lesion, if the husband stood bound, and was found to be excluded from quarrelling it? It was ANSWERED, —That though, during the standing of the marriage, it had little effect, yet, if she survived her husband, and became a widow, she might oblige her father to make up the defects of her contract, leaving him to recur for his relief upon her husband's heirs.

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1701. *December 24.* MATTHEW CUMMING *against* MARGARET SCOT and JOHN MUIR.

I REPORTED the competition about the estate of Mr John Kincaid of Corsebasket, advocate, betwixt Matthew Cumming and Margaret Scot, his sister's children, and his nearest of kin. John Baillie of Park, heritor of the lands of Corsebasket, makes a tailyie of these lands in 1659, to himself and the heirs of his own body; whilk failing, to John Kincaid his nephew, and the heirs of his body; then to Francis Kincaid and his heirs; and, last of all, to Margaret Kincaid their sister, and the heirs of her body. After Baillie's decease, John Kincaid does not prosecute the tailyie, but charges Baillie's sisters, as heirs of line, to enter heir to him in the said lands of Corsebasket; which they accordingly did, and disponed to him these lands, but exactly in the terms of their brother's tailyie, whereupon John is infeft; but afterwards resolving to change the holding, he resigns in the hands of the Duchess of Hamilton, superior, and prevails with her Grace to get them changed from ward to feu; and in this charter the tailyie is neglected, and the lands taken to himself and the heirs of his own body; which failing, to his brother Francis, and the heirs of his body; and these also failing, the fee to return to himself, and his own heirs whatsoever; and on this he is also infeft. On John Kincaid's decease, in June 1700, Matthew Cumming, eldest son to Margaret Kincaid, the last branch and member of the tailyie made by John Baillie, serves himself heir of provision and tailyie to the said John Baillie, and thereon infefts himself as *hæres ex asse* in the whole lands:

Margaret Scot, a niece of John Kincaid's by another sister, retours herself heir-portioner to her uncle, and, being also infest, pursues for the half of the maills and the duties of the lands. In which process Matthew Cumming compears, and claims the whole, and repeats a reduction he had raised of the disposition made by Baillie's sisters to John Kincaid, upon the Act of Parliament 1621, as done *inter conjunctas personas*, without one onerous cause, to the prejudice of him, a lawful creditor as heir of tailyie.

ANSWERED,—Heirs of a marriage have been sustained as creditors to quarrel any subsequent provisions in posterior contracts of marriage; but an heir of tailyie, who has only *nudam spem succedendi*, and only a mere destination, can never be reputed such a creditor as is meant by the Act of Parliament 1621.

The Lords repelled this reason of reduction, and found, though the sister's disposition was not relative to, nor in express implement of Baillie's tailyie, yet it was a material implement in so far as it ran in the same channel, and was to the same individual and specific members of tailyie nominated by Baillie; and so, being neither an innovation nor alteration thereof, he could not reduce it, because it was not a deed prejudicial to the tailyie.

Then Margaret Scot, and James Muir her husband, founding on the posterior infestment taken by Mr John, upon his own resignation to himself *et hæredibus suis quibuscunque*, as a plain revocation and alteration of the tailyie:

It was ANSWERED for Matthew,—That *nihil aliud agebatur* by this new infestment but allenaryly to change the holding, and *non apparet* that he designed to alter or invert the succession fixed by Baillie his uncle; and "heirs whatsoever" must be understood here *in sano sensu et in terminis juris*, that he meant the heirs of his former infestments: even as if a bond of corroboration or an eik of reversion be taken to different heirs from those contained in the principal bond or wadset; yet the heirs of the first writ over-rule the accessory, and interprets the parties' meaning to have been uniform, and not to have put his several heirs by the ears, by leaving one of his rights to the heirs of line, and the other to the heirs of tailyie: And thus the Lords have oft found; and see a parallel case in President Craigmillar's Decisions, *January 1665, Scot against Scot*.

ANSWERED,—The analogy of law may require that construction between principal and accessory rights; because *accessorium sequitur suum principale, et surrogatum sapit naturam ejus in cujus locum surrogatum*; but that a resignation in favour of himself, and his heirs whatsoever, must be strained to be the heirs of his former infestment, where he has not said so, was an unaccountable interpretation, and supported by no topic in law.

Then Matthew, for clearing what was the deceased John Kincaid's meaning and design as to his succession, founded on a letter writ by him to Matthew's wife before the marriage, wherein he assures her that Matthew had the surest claim to his little fortune after his death: and that such letters, in treaties of marriage, are effectual and obligatory, appears by the decision, *10th July 1672, Shaw of Sauchie against Bruce of Clackmannan*; where a like letter was only repelled, because it was a conditional offer, and the conditions annexed never fulfilled. *2do*. Mr John, by his latter-will and testament, nominates Matthew his heir and successor in his lands, and leaves this Margaret Scot a legacy of 4000 merks; and in case she controverts Matthew's title, then her legacy to be void: all which speak his *enixa voluntas*.

ANSWERED for Scot and Muir,—That parties' intentions are to be scanned by

what is done, and not by a *propositum in mente retentum*; but here the tailie is actually altered; *ergo* it was intended; and this cause cannot be shored up by such weak props, for the letter is only a compliment *et verba officiosa*; and his testament cannot convey a fur of land, which Mr John, as a lawyer, knew very well; and whatever he intended, *non fecit id quod potuit*; and the tailie being broken, these indications and conjectures of his will, however favourable to Matthew, can never make the tailie reconvalesce.

The Lords thought there were presumptions enough that Mr John designed Matthew Cumming to be his heir, but he had not done it in the habile way; for if his last infestment had borne, that, failing heirs of his own body, then to the heirs contained in his former infestments, that would have kept the tailie in being; but being conceived simply to return to himself, and his heirs whatsoever, that could admit no other construction but that the tailie was innovated and passed from. And some of the Lords observed, that, next to his own heirs to be procreated of his body, he brought in his brother Francis and his heirs, which evidences that he had the tailie then in his view; for he expressly assumes Francis one of the members of it, and pretermits the rest. And therefore the Lords repelled Matthew's grounds, whereby he craved preference to the whole; and found the said Margaret, as heir-portioner, had right to the half.

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1701. December 26. JOHN INGLIS *against* His TUTOR DATIVE, &c.

JOHN Inglis, merchant in Nairn, having fallen melancholy and unfit for business, his friends took out a brief of idiocy against him, whereupon he was retoured, on the verdict of fifteen sworn men, to be *rei suæ non satis providus*; and thereon a tutory-dative was obtained from the Exchequer, with this quality, So long as his weakness and silliness continued. Time having dispelled these clouds and vapours, he becomes as capable of business as he was formerly; whereon he raises a declarator of his convalescence, concluding a reduction of the retour and tutory on that head; and whereto he cites his nearest of kin, and procures declarations, bearing his present fitness and capacity of managing, as much as any other prudent man of his circumstances: and he craves a commission to the Sheriff of Nairn to try his present condition of mind and judgment, and to report; in regard he was not able, in respect of his age and the winter-season, to come to Edinburgh.

The Lords found a verdict of a sworn inquest could not be taken off, neither by subscribed declarations nor by a commission to others to try; but that the cognition and trial behoved to be taken before the Lords *in præsentia*, by various questions and interrogatories; and therefore refused a commission; but allowed probation to be taken of his being now habit and repute prudent and provident, and fully reconvalesced; and appointed him to sist himself before the Lords, in the beginning of June next, that the trial might proceed *causa cognita*. Some thought, in case of utter inability to travel, a commission, in such an extraordinary case, might be granted; otherwise such a man's liberation from the imputation of idiocy should want a remedy, and he be deprived of the liberty and free disposal of his goods, moveable or immoveable: But the Lords required his per-