

1663. February 5.

LENOX against LINTON.

Lenox being married to Margaret Mogie, who was an heretrix, she dying, Lenox's son was infest as heir to her; who dying also without issue, this Lenox, as his brother by his mother, and alleging him to be apparent heir to his brother Lenox, in these lands, whereunto his brother succeeded to their mother, craves exhibition of the writs of the lands, *ad deliberandum*. The defender Linton alleged absolutor, because his son, being infest in the lands as heir to his mother, his nearest agnate on the father's side, his apparent heir, and none on his mother's side; for we have no *interim succession*, neither holds it with us, *materna maternis, paterna paternis*;

Which the Lords found relevant, and that the father was apparent heir to his son, being once infest as heir to the mother; and therefore assolizied.

*Fol. Dic. v. 2. p. 397. Stair, v. 1. p. 172.*

No. 5.

A son being infest as heir to his mother, and dying without issue, his brother uterine found not to be heir to him, but to his father.

1664. July 20.

LADY CLERKINGTON against STEWART.

Lady Clerkington pursues the heirs of umquhile David Stewart, son to the Laird of Blackhall, for the sum of 200 merks due to her husband. It was alleged for Walter Stewart, brother to the defunct, defender, no process, because the heir of line of the defunct David Stewart was not called, in so far as David, being the only son of the second marriage, and having neither brother nor sister of that marriage, his heir of line could not be Walter Stewart, youngest son of the first marriage, but the heir of the eldest son of the first marriage; according to Craig's opinion, *De successionibus*.

The Lords found, That in this case, Walter, as the next immediate preceding, was both heir and of conquest, and not the eldest brother.

In this process, it was also alleged, that this sum was a clandestine fraudulent paction, contrary to the contract of marriage, betwixt the defunct David Stewart, and the defender's daughter, whereby 10,000 merks being contracted with her in tocher, and Blackhall granted a proportionable life-rent thereto; yet underhand, without Blackhall's knowledge, his son was induced to give bond for this 2000 merks, to take away 2000 merks of the tocher: And it was remembered by some of the Lords, that in the like case, a discharge of a part of a son's provision granted to his father, contrary to his contract of marriage, was found fraudulent and null by exception.

The Lords did not decide, but rather desired the parties should agree, but thought this was an unfavourable act of dangerous consequence.

*Fol. Dic. v. 2. p. 398. Stair, v. 1. p. 220.*

No. 6.

If the defunct be the youngest brother, the immediate elder is both heir of line and of conquest.