

debtor to Carnegy of Balnamoon, and having no other way to pay him, he assigns him to that obligation in the contract of marriage, whereby Macintosh, his goodfather, is obliged to pay him 2000 merks; Balnamoon, charging for the sum, Macintosh suspends on this reason, that he was not liable to pay it *simpliciter*, but to pay it under this quality, that it should be employed first for the use of his daughter, and then for the children of the marriage; in respect of which destination he cannot pay it to this assignee.

To which it was ANSWERED,—That the charge at the assignee's instance, must be found orderly proceeded, notwithstanding of the reason; because any destination of the tocher contained in the contract of marriage, takes not away the husband's dominion therein, in so far as the wife is dead, and so her liferent thereof can never exist; and for the children they can lay no claim in it, because it is provided to the heirs of the marriage, and how long the father lives they cannot be heirs.

REPLIED,—By heirs must be understood bairns.

DUPLIED,—However heirs might be interpreted bairns in a man's second contract of marriage, yet it can never but be properly taken for heirs served and retoured in the first, as this was. *Item*, The father is doubtless fiar of the sum; and so may dispose and assign it at his pleasure, because the termination of the fee is on his heirs.

The Lords found the letters orderly proceeded, reserving action to Macintosh against the charger's cedent, to see the contract of marriage fulfilled to his grandchildren. This seems pretty hard, and is direct contrary to that decision in Dury, at the 20th November, 1623, *Goodman of Kinblathmont*. *Vide infra* November 1677, *Barbara Grant* against *Janet Cuthbert*, No. 647, § 4.

It were to be wished that some of the Lords' number, and the lawyers, did meet, and take to their consideration the import of all the clauses used in contracts of marriage, by explaining the ambiguity of the said clauses, and by setting down a certain rule whereby they may be equally and alike understood in all time coming. *Vide infra*, No. 351, [*Lundy* against *Lundy*, 26th June, 1672] *in fine*; and 396, [*June*, 1673;] and 430, [*Lauder* against *Alisone*, November 1673. *Advocates' MS. No. 321, folio 129.*

1672. February 9. Anent The TOWN OF EDINBURGH'S CHARTER in 1636.

ABOUT this time I had occasion to see the town of Edinburgh their great charter, granted to them by King Charles in 1636, with the seasine taken thereon in 1637. It is a new gift to the town of their burgh, mills, common moor, port and harbour of Leith and Newhaven, superiority of Leith, dock-money, anchorage-money, golden pennies, &c.; office of sheriff-ship and justiciary of peace, within their town and liberties, &c. with a ratification of all their former infestments. As for the badges of honour and sovereignty (so to speak) conferred on the Provost and other Magistrates of the city, *viz.* the sword, sceptre, and red robes, these are by the grant of King James the VI. by his charter under the great seal in 1621, and that on the parallel of the Lord Mayor of London.

Many persons are of the opinion that this last charter in 1636, has done the town much more hurt than good, because it has either cut them off expressly from sundry privileges comprehended in their ancient infeftments, or prejudged them thereof, in so far as they are altogether omitted in this. I shall instance only one. Craig in *Dieg. de Regalibus*, page 117, tells, that the town of Edinburgh, by a special privilege, are indulged the escheat of all condemned within their burgh and liberties for slaughter; and *idem*, page 121, tells they have the power of having and retaining their own fisk; yet by the charter, 1636, the escheats of all persons condemned within the town are specially reserved to the king, and the town for ever secluded therefrom.

It was sore against the town's heart and will that they altered their former charter, but they were forced to it. See more of the town of Edinburgh's charter, *alibi*. (*Vide* Balfour's practiques. *Tit. of Burrows*, cap. 20.) From the council books of the town of Edinburgh in 1629, &c. I find they had procured a charter in 1603, with many strange clauses and privileges; *videlicet*, right of regality, admiralty, right of the north castlebank, as well as the south; and very prejudicial to the gentlemen of West Lothian; which they were \* \* \* \* \*

*Advocates' MS. No. 322, folio 129.*

1672. *February 9.* The PROCURATOR FISCAL OF AIR *against* \_\_\_\_\_.

THE Sheriff-clerk of the Sheriffdom of Air being indebted to a gentlewoman, liferentrix of some lands within the said Sheriffdom, the sum of L.40 Sterling; that he may get an apparent ground of compensation, (for the act gives the fines of all within heritors to the respective courts, who shall see to the execution of the acts;) he causes the Procurator-fiscal pursue her before the Sheriff court, upon the 7th act of Parliament, made in anno 1670 for tinsel of the eighth part of her liferent; and that for her withdrawing and absenting herself from her parish church, by the space of three Sabbath days together, for several times, so that an eighth was *toties quoties* due; and in absence, procures a decret against her. This decret was suspended on thir two reasons, *1mo*, That the act means only for wilful staying away, and not of every withdrawing; and so the decret was null, in so far as it was not proven therein that her separation was through non-conformity: likeas, she offered her to prove *causam maxime sonticam absentiae, videlicet* sickness. *2do*, Though the act 1670, requires no more for incurring the fines thereby imposed, but only unnecessary absence for the space of the three Lord's days together; yet the first act in 1663 (which must regulate the act 1670, and interpret it in so far as it is silent or doth not abrogate it *per expressum*,) requires (and that most rationally) that before any one be stated as guilty of that act, they must first be admonished by the minister, in presence of two sufficient witnesses, and that must be so attested by him: now *ita est*, this method (which seems to be Christ's own, first admonish thy brother in secret; if that prevail not, then before the elders; if he still remain obstinate, then *dic ecclesiae*;) was not used with her: *ergo*, &c.

The charge, in my weak judgement, ought to be suspended *simpliciter*.

*Advocates' MS. No. 323, folio 129.*