other person than her father; otherwise they found, that she, being *in familia*, the goods behoved to be reputed the father's goods; and the delivering of the same upon inventary ought to be ascribed to the fulfilling of the contract of marriage *pro tanto*.

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1674. *January* 23. MR WILLIAM NISBET *against* ROBERT MEINE.

IN a poinding of the ground, pursued at the instance of Mr William Nisbet, as having right, by progress, from one Gourlay, who had comprised a tenement of land, lying in the town of Edinburgh, from James Nisbet, with the pertinents, and all right that he had thereto, against Robert Meine, who was infeft in a laigh booth, which was a part of the said tenement:—

It was ALLEGED for the said Robert, That the pursuer had no right, as being infeft upon his comprising; because the said annualrent was not specially denounced to be apprised, nor no special infeftment taken in the said annualrent; without which no comprising or infeftment of the property could carry the same, they being distinct rights of their own nature.

It was REPLIED, That this laigh booth, being but a part of the tenement, which was disponed with a reservation of the said annualrent of £20 yearly, the said annualrent did remain as part and pertinent of the whole tenement whereof the laigh booth was a part before the disposition thereof; likeas the said James Nisbet, heritor of a great part of the tenement, against whom the comprising was led, was specially infeft therein.

The Lords did sustain the poinding of the ground, notwithstanding of the allegeance; which they found not competent to Robert Meine, who could pretend no right himself but only to the laigh booth, out of which the annualrent was reserved: likeas, he had secured himself from all hazard of the said annualrent, having allowed to him 500 merks out of the first end of the price, until the same was purged. But if any other, as having right, by a special apprising or infeftment of the annualrent from James Nisbet, had compeared and proponed this allegeance against the pursuer's comprising, it had been otherwise decided.

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1674. *January* 23. SAMUEL CHEISLY *against* FRANCIS WAUCHOPE.

IN a suspension, raised at Samuel Cheisly's instance, against Francis Wauchope, who had charged him as having right by translation from his wife, who was assignee constituted by his sister, to whom the suspender had granted bond for the sum of ————, upon this reason,—That the charger could have no right by translation from his wife; because her assignation from her sister was to her and her children, secluding her husband; so that it was not in her power to transfer the same in his favours:

It was ANSWERED, That his wife, being fiar, and having only right whereby she might uplift, or her creditors affect the sum contained in the bond; notwith-

standing of that clause secluding her husband, she might transfer her right to him, or any others for his behoof.

The Lords found the letters orderly proceeded, notwithstanding of the reason libelled; and, notwithstanding that the husband was secluded, found, That the wife might transfer her right, which was founded upon her assignation.

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1674. *January* 27. MR JOHN SPREULL *against* MR ROBERT STEWART.

IN a suspension of a decreet, obtained at the instance of the said Mr John Spreull, as having married Katharine Marshall, against Jean Darach, relict of John Marshall, and Robert Stewart, her second husband, for payment of the sums of money due to the said Katharine, as her bairn's part of gear, and as assignee by William Marshall, her brother, for his bairn's part, which fell to them by decease of their father; upon this reason, That the decreet recovered against him was only as representing his father, who had married the said Jean Darach, who was executrix to her husband, John Marshall; and the decreet being against him *pro interesse*, after his death his son could not be decerned as representing him, that interest having ceased:

It was ANSWERED, That the reason was noways relevant; because his father was *locupletior factus* by the said marriage, in so far as his wife, being executrix, did assign him to the whole benefit of the executry; which amounting to a great sum, and he having married her within less than a year of her first husband's decease, he is liable to count to the bairns for the whole inventory, unless he can show that he hath done exact diligence against the debtors who were insolvent.

It was REPLIED, That the suspender's father having right, by his contract of marriage, to no more but 7000 merks, which was due to his wife as relict, for her third part, and having intromitted with no more after the marriage, the said sum being only a competent tocher for a man of his fortune, and such as was necessary *ad sustinenda onera matrimonii*; and, unless that the chargers can prove that his father intromitted with more, he is not liable, in law, to count for the same, his father being now dead, and his interest ceasing.

It was DUPLIED, That the suspender's father, having married an executrix, and being assigned to the same, and a decreet recovered against him during the marriage, he was thereby constituted debtor, and any representing him must be made liable.

The Lords found, that her intromission, as executrix, with the sum of 7000 merks, could not be attributed to the third part only of the whole inventory of the testament; but that she was countable to the bairn's legators for two parts thereof: As likewise, they found, That her office of executrix did not cease by her subsequent marriage, her husband being obliged to authorise her to pursue and execute the office during the marriage. But the decreet being given against him *pro interesse*, if his representatives were liable thereto after the dissolution of the marriage, unless they could prove that he or his wife did intromit during the marriage, was not decided.

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