

1708. *February 5.* ANN and ELISABETH HAMILTON *against* ISOBEL HAMILTON and SIR WILLIAM GORDON of DALPHOLLY.

ANN and Elisabeth Hamiltons, the younger daughters of my Lord Halcraig, pursue Dame Isobel Hamilton, their elder sister, and Sir William Gordon of Dalpholly, her husband, on this ground, That he having tailyied his lands of Milton to his son, then alive, and, failing of him, to the said Isobel and her heirs-male, with the express burden of all his debts contracted, or to be contracted, as fully as if they had been served heirs to him, or personally obliged; and he having left his lands of Halcraig, and several heritable sums untailyied, wherein the three sisters would succeed equally; therefore they craved, that, conform to their father's will, burdening the tailyied lands, *per expressum*, with all his debts, the elder sister succeeding in these tailyied lands may pay the debts descended on, and relieve the untailyied lands and moveable effects of the same, that they may remain free of the debts; and so divide equally amongst them the remanent of his estate.

ANSWERED,—That the clause burdening the tailyied lands with the debts was distorted to a sense never designed by the tailyier; for my Lord Halcraig meant no more, but, like an honest man, to secure his creditors in all events, and so to declare all his heirs liable, but noways to make his tailyied lands solely and absolutely liable, without relief and recourse against his heirs of line; for, if that had been designed, then it would have bore, that the tailyied lands were to have paid the whole debt, without any relief from either the moveable or other heritable untailyied estate. And it is impossible in common sense he could think otherways; for he shows his *enixa voluntas* to have his memory continued; and so takes the heir of tailyie obliged to assume the name and title of Hamilton of Halcraig. Now, how could he dream this was practicable, if he laid his whole debts on these tailyied lands, and gave them no relief against his other estate? For this was with one hand to build up a chimerical tailyie and representation, and with the other to ruin and sink it for ever, seeing his debts are more than the value of his tailyied lands, if his other estate shall be burdened with no part thereof. And it is worse than the Egyptian bondage, requiring brick without furnishing either clay or straw; which is such a fantastical notion, that it is not without injury to my Lord Halcraig to suppose he would be guilty of such a mockery and blunder; for how shall his memory be perpetuated, if the subject be absorbed by debt? and therefore the clause can admit of no other interpretation but this,—If so be my moveables and untailyied estate do not amount to pay my just debts, then I burden my heir of tailyie and tailyied estate with the same; whom he did not deprive of the *beneficium ordinis et discussionis* given them by law, but brings them in *subsidiarie et in suo ordine*, subjecting them all to his creditors; but so as not to deprive them of their relief against one another, according to law.

REPLIED,—There is no arguing against a plain positive clause, where my Lord Halcraig has burdened his tailyied estate with all his debts. And we know that *provisio hominis tollit provisionem legis*; and there was no necessity to exclude his heir of tailyie from recourse, for that was sufficiently implied in the clause: and the curtness and closeness of our styles shun tautologies. And to turn over the debts upon the moveables and untailyied estate, is to give the two younger

daughters nothing ; which could never be my Lord Halcraig's design. Neither was this so unreasonable, to lay the debts on the tailyed estate, for much of it was contracted to purchase these tailyed lands of Milnton : and there is nothing more natural than for the price to burden the subject. And, after all, the eldest sister, coming in with the rest, will have better than 40,000 merks of her father's succession, which may well uphold a representation both for his name and arms. And this declarator now sought is neither heresy nor novelty ; for, on the 23d July and 21st November 1680, *Lady Margaret Cunningham* against *Lady Cardross*, it was found, an heir of line might seek relief of the debts against the heir of tailyie.

DUPLIED,—The *cortex verborum* is not to be noticed, but the reason, design, and meaning of parties must be followed : and, whatever the clause in the literal grammatical sense may sound, as to the burdening of the tailyie with the debts, yet that can never cut them off from their relief competent in law : and the younger daughters will have suitable portions when the debt is paid off the whole head.

The Lords thought the clause strait ; and therefore, before decision, named some of their number to endeavour to settle the parties, that each of them may get a competency, if possible.

*Vol. II. Page 427.*

1708. February 10. VANS and CRAWFURD against WILLIAM KENNEDY of DALJARROCH.

DAVID Ferguson, in Air, having a stock of 1400 merks in the African company, and he being debtor by bond to Sir John Ferguson, wherein another Ferguson and one Macjarrow of Bar are bound conjunctly ; William Kennedy of Daljarroch pays Sir John, and gets an assignation to the bond, and thereon arrests the money in the Commissioners of the Equivalent's hands ; and likewise gets a voluntary assignation from the said David Ferguson to his share, and intimates the same duly. David being likewise debtor to Vans and Crawford, they raise horning on their bond, and arrest in the Commissioners of the Equivalent's hands ; but, when the multiplepointing comes to be discussed, Daljarroch is preferred, both on his prior arrestment and on his first intimated assignation ; therefore Vans and Crawford insisted, That, seeing he got payment of his whole debt, he might assign them against the other two co-principals, that they may not totally lose their debt.

ANSWERED,—I can never be obliged to assign, but only to discharge ; because any payment I have got is out of the principal debtor's effects ; especially seeing one of them is turned insolvent and broken.

REPLIED,—The Lords have demurred to ordain a creditor to assign, where he instructed a prejudice, such as, that he had other debts unpaid ; but whenever his whole interest is satisfied and extinct by payment, they overruled that invidious refusal of assigning : for, in all competitions, where a creditor has more securities than one, and, by affecting part of the subject, is preferred ; because he thereby debar the other creditors, therefore it is but just that he assign what farther security he has, that thereby the other postponed creditors may operate their own payment the best way they can : and that one of them is failed, is our prejudice and loss ; but we will take our hazard.