seasin; and all that a prudent man could do to expede the first infeftment, was, in the construction of law, equivalent to infeftment; and, therefore, a ground of preference to Cardrona, who got the start of him only by the bailie's partiality.

REPLIED for Cardrona,—The bailie was in the right, not to comply rashly with Thomas Thomson's desire, because of the dangerous consequence of infefting any person as heir to his predecessor, which subjects him to a passive title; and because of the want of a procuratory for that effect.

The Lords preferred Cardrona; in respect that the disposition in his favours bears a procuratory for serving the disponer heir to his predecessor in the subject disponed, and Thomson's disposition bears no such procuratory or warrant; albeit it was alleged for Thomson, that the disposition in his favours implied a warrant for serving the disponer heir to his predecessor, in the subject disponed.

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1708. *July* 22. WILLIAM ROLLMAINERS *against* The LADY BLANTYRE, and others.

WILLIAM ROLLMAINERS having raised a furthcoming against the Lady Blantyre, of some moveables belonging to William Scot, merchant traveller, his debtor, arrested by him in her hands; and, after an act was extracted, the defender having, for her own security, called the other creditors of William Scot in a multiplepoinding: the raiser of the process of furthcoming craved, that *ante omnia* before deciding the preference, he should be preferred for expences he had been at in raising summons, extracting acts and other diligence, in order to make the subject effectual; as being in *rem versum* of the party who comes to be preferred, and disbursed upon the common interest: seeing it were hard another preferred should reap the benefit of Rollmainers's charges, and draw the whole stake without any burden thereof; and in sales, or other common concerns of creditors, the money expended to make the subject effectual, useth to be paid off the whole head.

The Lords refused to allow expences. *Page* 271.

1708. *December* 10. SIR ALEXANDER CUMING *against* JOHN VERE KENNEDY.

SIR ANDREW KENNEDY, having in anno 1689, got a commission from King William, to be, during his lifetime, conservator of the Scottish privileges in the Netherlands, and his Majesty's resident: he, in anno 1697, procured a new commission to himself and his son, narrating and ratifying the former; with a *novodamus* to them, during the lifetime of Sir Andrew, to be conjunct conservators and residents, and to John Vere Kennedy, to be conservator and resident after his father's decease, during the King's pleasure. Sir Andrew Kennedy having, for malversation, been deprived of his office of conservator, *January* 16, 1708; and of

the office of resident, *January* 29, 1708; and the decreet extracted: John Vere Kennedy stepped in for his interest, and contended, That notwithstanding the reduction of his father's right, the commission *quoad* him stood good during his father's lifetime, and, thereafter, *durante beneplacito reginæ;* and, therefore, Sir Alexander Cuming's right to the office could not be declared.

ALLEGED for Sir Alexander Cuming,—The son's right depended on the father's as to any fixed period of time; and when the father's came to cease, the son's right to the office resolved in a *beneplacitum,* which is declared by a new gift from her Majesty to Sir Alexander Cuming. For can the clause appointing him conjunct with his father during his father's life, make him conjunct with his father, when his father cannot be conjunct with him? or, can the words conjunct conservator during his father's life, import conjunct conservator without his father, during his father's life? This is the very reverse sense of the words. And can any man of common sense imagine, that Sir Andrew, who had right to the office *in solidum* by the first commission, which was ratified in the second, did forfeit his office to his son, and not to the sovereign? This were indeed to encourage vice, and reward iniquity with a witness. So that, by the conception of the gift, both the life and conjunction of the father are necessary to exist together, for sustaining the son's title beyond the sovereign's good pleasure.

ANSWERED for Mr. Kennedy,—His being conjunct in the commission with his father, was only a conjunction in the right and title, and not as to the exercise: for he and his father might have acted separately in the administration. And though a gift of this kind, to any single person during his life, implies the condition of *quamdiu se bene gesserit,* and is understood to continue *ad vitam, aut culpam:* such a gift, in favours of two, jointly during the life of one of them, that *terminus* must strictly be understood of the other's natural life allennarly, without the foresaid implication or extension to *culpa.* For seeing Sir Andrew could not, either by voluntary dismission, or incapacity to officiate, prejudice his conjunct, far less could he by his transgressions.

REPLIED for Sir Alexander,—1. If the right to the office fall upon dissolution of the conjunction, the exercise must fall in consequence; for it is no less absurd for Mr. Kennedy to divide the exercise from the right itself, than it is for him to pretend any other right than *ad beneplacitum,* after his father is laid aside. 2. The distinction betwixt a grant to one person during his life, and a grant to two during the life of one of them, has no foundation in law, unless the two persons' rights were in distinct commissions: whereas, here the father and son are individually conjoined in the same gift. 3. Upon the ceasing of the father's right, whether by death or otherwise, the son's right falls to the ground, and resolves in a *beneplacitum*; as the office of tutors named jointly falls by the death or incapacity of one of them. *June* 17, 1671, *Drummond* contra *the Feuars of Bothkenner.* Mandates, commissions, factories, and letters of actornie, granted to two jointly, are void, and return to the granter by the death of one of them. So an office granted to two, not *conjunctis et divisis et alteri eorum diutius viventi,* vacates upon failing of one of them: as the Lord Coke observes in the 11th book of his Reports in Auditor Curl's Case, and in the case of the Sheriffs of London; and Plowden, fol. 382, and fol. 180. Because thereby the trust and confidence

required in the office is broken; *nam securius expediuntur negotia commissa pluribus.* So that Mr. Kennedy loses his right upon his father's deprivation; not by way of punishment, but by an implied limitation in the conception of the gift itself, bearing only to them jointly, which cannot subsist in one.

The Lords found, That the reduction of Sir Andrew's right upon malversations, had the same effect against his son's right, as if he, Sir Andrew, were naturally dead.

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1709. *January* 26. Mr. JAMES HILL, Minister at Kirkpatrick, and AGNES MUIRHEAD, his Spouse, *against* GEORGE MUIRHEAD, Son to the deceased JAMES MUIRHEAD, late Bailie of Drumfreis.

BAILIE MUIRHEAD having taken an heritable bond for 7500 merks principal, from Sir Robert Grierson of Lag and others, In favours of himself and his assignees whatsoever; and failing of him by decease, to Robert, Samuel, and George Muirheads, his sons, equally and proportionally amongst them, and the lawful heirs of their respective bodies; and failing one of these by decease, without any such heir, to the other two, and the heirs of their bodies; and two of them so failing, to the survivor, and Isobel, Jean, and Agnes Muirheads, the Bailie's daughters, equally and proportionally, their heirs and assignees whatsoever: After the death of the father, and Robert and Samuel, who died before him without children, Agnes Muirhead and her husband pursued Sir Robert Grierson for payment of a fourth part of the sums in the bond.

Compearance was made for George Muirhead, who alleged, that by the decease of the brother, who died first, he came to have right to the half of the bond: so that afterwards upon the other brother's death, the substitution in favours of him and his sisters could only extend to the defunct's half, whereof Agnes could claim only a fourth part. It is not to be supposed that the father, who provided a third share to George, in case his two brothers had lived, designed to restrict his portion after their death in favours of the daughters; who were only brought in with him, upon such an event, in the last place: and no substitution can exceed the share of the institute to whom the substitution is made. 2. George must at least have as much as all the sisters; because he is put in one sentence by himself, and the three sisters are contained in a separate sentence, and so are to share but as one person, *Arg.* § 6. *Instit. de Hæred. Instit. Vinnius ibid.*

ANSWERED for the pursuers,—1. We are not to inquire into the father's design, where his words are clear, that the money should be divided equally betwixt the surviving son and his three daughters; and the father had the free disposal of his own without rendering a reason for his destination. And albeit George might have pretended right to the half of the brother's portion who died first, had he survived the father, and thereby established the fee in his person: the father, who was fiar of the money, having survived the two sons, George and his sisters must be considered simply as joint successors to