1752. *November* 15. MACREDIE of Pearston *against* The EXECUTORS of MACFADZEAN.

This Case is reported in Fac. Coll. (*Mor.* p. 4402.)—It was reported to the Court by LORD KILKERRAN. The report is in the following terms:—

" THE deceased Andrew Macredie, provost of Stranraer, made a considerable estate of land and money for that small place: his land estate he settled upon Andrew, his son, and his personal estate and tenements upon his three daughters, Helen, Janet, and Margaret.

" And *inter alia*, he granted a bond of provision to his eldest daughter Helen for L.400, and having, thereafter, in February, 1741, lent L.500 to Sir James Cunninghame, and James Whitefoord of Dunduff, he took their bond payable to himself in liferent, and his said daughter Helen in fee; but with a faculty to himself, at any time in his life to uplift, discharge, or convey the sum at pleasure, without the consent of the said Helen his daughter.

" This Helen soon thereafter intermarried with James Fergushill, writer in Edinburgh, and sometime in that same year, 1741 or 1742, died, after having by a postnuptial contract made over all she had to her husband, who also died a short while thereafter, and his executors have no concern in the present question.

" As the provost had settled a provision upon his eldest daughter Helen, as has been said,—so he had also given a provision to his second daughter Janet, of L.400 sterling, by a liquid bond, besides some houses in Stranraer; and when, in the year 1744, she married James Macfadzean, writer in Edinburgh, by the contract of marriage entered into, with advice and consent of her father, Macfadzean, the future husband, becomes bound to settle L.400 of his own money, together with the L.400 contained in the bond to his future spouse, upon himself and her in conjunct fee and liferent, and children in fee; and she makes an ample conveyance to him of all and sundry lands, and annual rents to which she then had right, or to which she might succeed thereafter, in virtue of any deeds made by her father, either to herself or to his other children, or to which she might succeed, or have right from any other person; and, farther, constitutes him her assignee to all and sundry debts due to her, by whatever person or persons, by bond or otherways.

" Just about a month after this marriage of Janet with Macfadzean, the provost exerces the faculty reserved to him in the bond of L.500, by Sir James Cunninghame and Whitefoord of Dunduff; and upon the narrative of it, assigns that bond to Janet, his new married daughter, and Margaret, his only other and unmarried daughter, equally between them, and failing of either of them by decease without heirs of their bodies or conveyance in a contract of marriage, to the survivor of them; and it is upon the import of this substitution that the present question arises.

" You will then know, that in the year 1747, Janet, then wife to Macfadzean, upon the narrative that, by her contract of marriage, she had conveyed to her husband all debts, sums of money, and others, to which she might succeed; she, in implement of that contract, conveys to him all the particular subjects she could think of, and, *inter alia*, her share and interest in this bond of L.500 Sterling, due by Sir James Cunninghame and Dunduff, that is to say, the one-half of the

sum, as it was assigned by the father to her and her sister Margaret, equally between them; and soon thereafter she died, without issue, and her husband did not long survive her.

"On the other hand, Margaret, her surviving unmarried sister, considering herself to have right to the whole, in virtue of the foresaid substitution, she conveyed all she had to her brother, Andrew Macredie of Pearston; and the present question is between him, as having right to the whole of this money, by assignation from Margaret, the surviving sister, and the executors of Macfadzean, who claim the half of it, as conveyed to him by Janet his wife.

"It is for Andrew, the brother, ARGUED,—That as the assignation to Janet and Margaret was not towards satisfaction of their portion natural, to which they had before been severally provided, (for Margaret, as well as Janet, had got her bond of provision,) but was a gratuitous deed of the father, the substituting of the survivor to the deceased, without issue of their body, could not be disappointed by a gratuitous deed, and such the assignation by Janet was said to be; as, however, it proceeded upon the narrative, that this sum fell under the conveyance to her husband in her contract of marriage, yet that narrative was not true, for there were no words in her contract of marriage that could comprehend it, when, with respect to heritage, she conveys all she then had, or might succeed to, yet so far as concerned sums of money, the conveyance in the contract of marriage was limited to what she then had right to. And that being the case, he contends that, as upon the general principles of law, the substitution in a gratuitous settlement cannot be gratuitously disappointed, so in this case that must undoubtedly obtain, when the power of either of them to assign, is limited to an assignation in a contract of marriage.

"On the other hand, it is PLED for the executors of Macfadzean, that in all simple substitutions, it is lawful for the person in the right, to disappoint them even by a gratuitous deed, as they import no more but a naked destination of succession, to take place in case the person in the right should die intestate; that it may be true the case is different where the substitution is onerous, as in what is called clauses of return, as where a subject is given with a substitution of a man himself, or his own right heirs, on failure of heirs of the institute's body, such substitutions are onerous, and cannot be gratuitously disappointed; but where one dispones to a third party, and only substitutes another, the institute may alter it at pleasure.

"And as to the circumstance, which is at first sight the most straitening in this case, as limiting either of the daughters their power to convey, otherwise than in a contract of marriage, ANSWERED,—That this turns the other way, when, 1*st*, upon a just construction of the contract of marriage between Janet and Macfadzean, such a right as this, though after accrescing, would be comprehended in her assignation, for, as it plainly conveys all heritage to which she should thereafter have right, it is not to be supposed intended that her conveyance of sums of money should be more limited only to what she then had, nor do the words necessarily import such limitation; but, 2*dly*, whatever may be the difficulty in this, taking the letter of the contract strictly, yet plainly it was in the view of old Macredie himself, when he made this assignation, that Janet's contract with Macfadzean did comprehend it, unless we shall suppose a thing so absurd, as nobody can suppose, that in a month after Janet's marriage, which was gone into with his own consent, he would limit her power of assigning, to an assignation in

a second contract of marriage, which the competitor Pearson finds himself to be drove under a necessity to say; which, yet say the executors of Macfadzean, no man alive can believe that old Macredie intended; and if it shall appear that old Macredie's notion was, that his daughter's contract of marriage comprehended this, it is sufficient, whatever difficulty there otherways might have been in constructing the contract itself."

[Here Lord KILKERRAN's report ends.]

24th July, 1752.—The Lords "prefer Andrew Macredie as assignee, by Margaret Macredie, his sister, to the whole sum in the bond in question;" and they refused a reclaiming petition without answers, *15th November*, 1752.

1752. *December* 19. JAMES THOMSON and OTHERS *against* STRATON of Laurieston and OTHERS.

THIS case is reported by Lord *Elchies*, (*Jurisdiction*, No. 59.) Lord KILKERRAN's note of it is as follows:—

"That riots, batteries, and the like acts, in their nature criminal, do in general fall under the cognizance of the Judge Ordinary, albeit committed by officers of the revenue when about the execution of their office, is undoubted. I say, in general this is undoubted, where the act is in its nature criminal, and which no statute can be pled to justify.

"But then, there are other kind of facts which may be pleaded to be justified by a statute, and, therefore, are criminal, and riotous or not, according to the construction of a statute. For example, an officer has a writ of assistance, and upon the authority of it, breaks open the door of an unentered house, and pleads the statute of (   ) to justify his so doing.

"ANSWER.—The statute only authorizes the entry, but not the breaking open doors; for that all that the statute does, in case entry is refused, is to impose a penalty. Now, when this is the case, and, indeed, it is the very case in hand, the question is, To which of the two Courts the determination of this question does belong? and it is far from being a clear one, and before the act of indemnity, my opinion would have been, that it belonged to the Exchequer.

"And all the question is, if that act has made such an alteration, that the Court should now have no jurisdiction?

"*June* 30, 1758.—The Lords sustained the jurisdiction of this Court.

"*December* 19, 1752.—The Lords having heard this petition, with the answers thereto, they supersede advising thereof until the Lords have a conference with the Barons of Exchequer thereon, and recommend to the Lord President to acquaint the Barons of the said conference. (Signed) Ro. Dundas." And by their other interlocutor, dated the 5th of December, 1753, they pronounced the following interlocutor:—" The Lords having again resumed the consideration of this petition, with the answers thereto, they supersede advising thereof, until the Lords have a conference with the Barons of Exchequer thereon, and recommend to the Lord President, for this week, to acquaint the Barons of the said conference. In consequence of which two interlocutors, the Lords, on this day, 11th December,