

1754. *June 26.*——— *against* ———.

[Kaimes, No. 63.]

AN apparent heir, in the right of a tack granted to his predecessor, pursues a removing: the defence was an assignation granted by the defunct, upon which the assignee was then in possession, and had been so for several years before the defunct's death.

To which it was ANSWERED,—That the assignation was false and forged, and the pursuer proponed in probation; and this gave rise to the question, Whether an apparent heir, in the right of a tack whereof the defunct was not in possession at his death, could propone in probation of any right to that tack without being served heir? And that again depended upon another question, Whether the right of a tack, whereof the defunct died not in possession, vested in the heir without a service, so that he could pursue a removing. And the Lords found that it did, because it is a rule of our law that a tack goes to heirs without service; nor hath the law made any distinction whether the defunct was in possession at the time of his death or no; and it would be very extraordinary if the transmission to the heir depended upon the accident of the defunct's being in possession or no, when he died; so that if he should be turned out of possession by any act of violence before his death, his heirs would have had no right to the tack without service.

*Dissent.* Elchies, Kilkerran, Kaimes.

1754. *June 26.*——— *against* ———.

IN a question from the town of Leslie, the Lords found that the passage betwixt the kennel of the street and the houses was part of the street or highway, and that a house, the bounds whereof were the highway, could not be built so as to encroach upon this passage or road; and for the same reason the Lords gave it as their opinion that all fore-stairs built there were illegal, and their dunghills laid there were nuisances.

1754. *July 2.* LUDOVICK STRACHAN *against* CREDITORS of JAMES STRACHAN of DALHAKIE, his Father.

[Kaimes, No. 64; *Fac. Coll.* No. 109.]

THE said Ludovick was, by his father's contract of marriage, provided to 18,000 merks Scots, and the half of the conquest; and this provision is de-

clared to be payable at the first term after the father and mother's death. Upon this obligation Ludovick adjudged; and the father's estate coming to a sale, the question was, Whether he was to be ranked with the onerous creditors?

Lord Kaimes was of opinion that no child *nasciturus* could be a creditor; but Lord Elchies said that there might be a right of credit in a child unborn, and that there was nothing to hinder a man to grant a bond to another man's children *nascituris*; but if the bond was to his own children, then there might be a doubt whether it was a right of credit or a right only of succession; and, in general, our law was inclined to give to children rather a right of succession than to make them creditors, by which commerce was impeded, and the father's free disposal of his effects hindered; but, however, if the provisions were so conceived as to be exigible during the father's life, in that case they were understood to give a right of credit, and it was upon this principle that the decision in the case of *Easter Ogle* proceeded, as is mentioned in the interlocutor upon that case; but here, as the provisions are not due till after the father's death, they only give, according to the genius of our law, a right of succession. And so the Lords unanimously found.

*N.B.* This was decided according to the principles of the civil law, by which every thing *collatum ad tempus mortis* is understood to be taken as a succession. (See Cujacius *ad Consult.* 58.)

1754. July 2. ARCHIBALD TROTTER *against* Mrs CAIRNS.

A WOMAN made a testament in favour of the said Archibald Trotter, which she afterwards revoked, and in the same deed made a second in favour of Mrs Cairns, her sister.

It was OBJECTED to this second testament by Archibald, *1mo*, That the woman, when she executed this last testament, had not the perfect use of her senses; *2do*, That it did not appear she had given any orders to make this second testament; *3tio*, *Esto* that she had given such orders, they were forced from her by urgent importunity and solicitation, particularly by the importunity of Thomas Trotter, her brother, who guarded her and kept every body from having access to her while this second testament was a-making, except such as he thought proper. As the proof with respect to these allegations was not clear on either side, it was moved from the Bench that Thomas Trotter, the brother, who, it was proved, had given the order to the writer to make out the testament, should be examined whether he received any such orders from the defunct, and with respect to other facts relating to the cause; and it was proposed to do this *ex officio et ad informandam conscientiam judicis*.

It was OBJECTED by Archibald Trotter,—That Thomas Trotter was in every respect an exceptionable witness; *first*, On account of his near relationship to the executrix; *2do*, Because he was the main agent in the business of the second testament; *3tio*, Because he could not deny that he had got orders from