

on his discharge and absolute warrandice ; albeit his right was very defective, and he had only the gift of one of their bastardies, whereas there were four of those brethren, called Oliphants, that had right to the price, as appeared by the Act of the Town-Council. And whereas Thomas contended that he needed give no warrandice, because the Town was secured by the prescription of forty years' peaceable possession, the bargain being in 1638, the Lords repelled this upon a report of Craigie's.

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1671, and 1679. JANET KELLY, Lady Eistbarnes, *against* The TENANTS of EISTBARNES.

1671. *December 5.*—THIS was an action for poiding of the ground upon a bond of provision, and infestment, and annualrent, relative to her contract of marriage ; wherein compeared Mr Laurence Charteris, who had comprised thir lands, and ALLEGED, No process at her instance, because he offered him to prove that Mr Cornelius Inglis, granter of the bond whereon the pursuer's infestment followed, was denuded of the right of property of the lands in favours of Mr Patrick Inglis his son ; and the said Mr Patrick infest before the pursuer's infestment of annualrent ; and Mr Laurence has comprised the son's right. (*Vide infra*, in June 1677, numero 583.) See 7th February 1679, *Eistbarnes' Creditors* and the *Lady's Executors*.

REPLIED, for the pursuer,—1mo, Albeit the defunct Mr Cornelius had been denuded of the property in favours of his son, yet the son's infestment was base, and never clad with possession till after the Lady's infestment. 2do, The pretended right being a disposition by a father to a son, without any adequate price, and after the Lady's contract of marriage, whereto her bond of provision is relative, the son can never quarrel the Lady's right, because, by accepting the said disposition, she will be liable, as successor *titulo lucrativo*, to fulfil his father's obligation ; and the father, by granting the said infestment to his son, was noway incapacitated to give his lady an infestment, depending on a preceding most onerous cause, her contract of marriage, against which her son's infestment cannot be obruded.

DUPLIED,—They offer to prove the son was infest, and in possession before the Lady's infestment. 2do, The son's infestment proceeding upon a disposition bearing to have been granted for causes onerous, is sufficient *quoad* a compriser, who, being a singular successor, is not obliged to debate whether the causes were onerous or not.

TRIPLIED,—The son's infestment could not be clad with possession before the Lady's, because it is dated only in March 1669 ; and, the rent being victual, it is payable betwixt Yule and Candlemas, and the Lady's infestment is in December, that same year, and so the son could not be in possession. 2do, As to the comprising, it is led against the son after the Lady's infestment ; and albeit the compriser were infest, (as is denied,) yet the right, made by the father to the son without an adequate price, is such a deed as makes him liable *ut successor titulo lucrativo*. And he not being denuded before the Lady's infestment, which is for implement of her contract of marriage, anterior to the son's

infestment, and so he cannot quarrel the Lady's infestment; *ergo*, no more can the compriser, seeing the son's right cannot be transmitted but *cum sua conditione et causa*: and the compriser can be in no better case nor his author, who could never prejudge the Lady's right, as is already shown. *3tio*, Not only is the son's infestment base, but the father continued in the possession; and any possession the son had was with the father *in familia*, and was the same before the right as after; and, being *tanquam possessio hæredis* after his father's decease, no person, deriving right from the son, can quarrel that deed, which, in law, he would be liable to fulfil.

QUADRUPLED,—The compriser must yet be preferred; because, *1mo*, It is sufficient to him to say the son's infestment bears, in the narrative, to be for onerous causes; which cannot be quarrelled, unless the contrary were proven *scripto vel juramento*. *2do*, Offers to prove the compriser stands infest before citation or intending action at the Lady's instance; and so the son was denuded *antequam res fuit litigiosa*. *3tio*, Offers to prove the compriser was infest before the father's decease, and so the son was denuded before he could succeed to his father. *4to*, Offers to prove the debts and sums of money which be the cause of the disposition to the son, are adequate and equivalent to the worth of the lands disposed.

There being an *avisandum* of this dispute, the Lords found the defence of *successor lucrativo*, for debarring the son from quarrelling his mother's liferent, was personal; and, though it would have met himself, yet it will not meet thir comprisers, who succeed in his right *ex titulo singulari*. As also, recommended to my Lord Craigie, Ordinary, to cause the defenders' procurators condescend on the manner of possession which the son had after the said disposition, and hear them thereon; and whether the son, before the disposition, was intrusted by his father with the managing his estate and lifting his rents.

Upon this interlocutor, the compriser craved a diligence against the son for producing his right, seeing he could not be master of it. The Lords refuse to grant diligence, and decern in favours of the Lady, in respect the appriser produceth not his author the son's right, without which the appriser had no interest; but, if he produce and condescend *ut supra*, within three or four days, and produce his infestment on his comprising, he shall be heard.

Then compearance was made for the son, who ALLEGED,—He must be preferred to the Lady, and that he has no necessity to produce his right *statim* because he is called. *2do*, Offers to prove the father is denuded of the property in his favours, and he standing infest before the Lady's infestment; and so is not obliged to debate whether the onerous causes be adequate or no.

REPLIED,—They oppone the former interlocutor, whereby the allegiance proponed for the appriser was repelled on that head and consideration, that the son's right was not produced. *2do*, The son being out of the country, *animo remanendi*, there is no procuratory produced. *3tio*, The son is only called as a possessor and intromitter; but, if he compete with the pursuer upon a right, it ought to be produced. *4to*, *Esto* it were produced, yet she must be preferred, because her bond and infestment is expressly relative to her contract of marriage, which is long anterior to the son's pretended right; which must be good, especially against the son, *qui est alioqui successurus*; and his accepting this right is *præceptio hæreditatis*, and so makes him liable *tanquam successor titulo lucrativo post contractum debitum*, seeing the son's right is not for onerous causes.

And it is frivolous to contend that he is not obliged to condescend on onerous causes, where the pursuer her right not only is founded on her anterior contract of marriage, but for a most onerous cause,—having brought above 20,000 merks of tocher with her. And the son's right was sinistrously impetrated, when the father was valetudinary, and now most unnaturally obtruded by him against his mother's jointure. As also, it was not her fault, but her husband's and her son's, that she was not better served of her liferent; for which it were hugely unjust to make her smart, seeing no action would have been sustained at her instance against her husband. And though she has seven chalders of victual in property, whereon it may be pretended she may live; yet that she had not of her husband, but as heir to her brother.

This going to *avisandum*, the Lords found the allegiance proponed for the defender, bearing that his father was denuded of the right of the lands, in favours of him his son, for an onerous cause adequate to the worth of the lands, and in possession before the pursuer's infertment, relevant; and assign the 20th of this month to prove, reserving *contra producenda*.

Then the pursuer ALLEGED,—The son's infertment being only base, and not clad with a possession distinct and separate from his father's, and continuing *in familia*, albeit it were for adequate sums, yet being *inter conjunctas*, and not made public; the lady's infertment, depending on her contract of marriage, which is, of its own nature, a cause most onerous, public, and favourable, must be preferred.

ANSWERED,—The son's right is not only for sums adequate, but also is clothed with possession distinct and separate, *videlicet*, payment of maills and duties, by tenants to him, and discharges given by him, in his own name, to them, *quoad* such lands as were laboured and possessed by tenants, and by labouring the lands not set to tenants with his own goods.

REPLIED,—Labouring with his own goods, which were formerly his father's goods, *non relevat* to infer possession, the son staying in family with the father, unless he will condescend and prove legal deeds, whereby the father was *habili modo* denuded, and the son invested with the *dominium* and possession of the said goods.

DUPLIED,—Offers to prove he laboured the ground with his own goods *ut supra*, and that he had right, by disposition and instruments of possession conform, as to such goods which were formerly his father's.

The Lords adhere to their former interlocutor, *viz.* find the son's right before the relict's infertment relevant, if for an adequate cause and in possession conform. And find the possession qualified by the son, *viz.* uplifting maills and duties from the tenants, giving discharges in his own name of such lands as were possessed by tenants, and by labouring the lands not set to tenants with his own goods; and that the goods which formerly did belong to his father were disposed to him, and an instrument of possession conform, before the lady's infertment,—relevant to be proven, thus: *viz.* the onerous causes *scripto*, and the uplifting the duties and labouring the ground *prout de jure*, and the right and possession of the goods from the father *scripto*: reserving to the Lords' consideration, after probation, how far the son's right and possession shall operate against the pursuer's right, he being *in familia* with his father for the time.

*Advocates' MS. No. 282, folio 118.*

1679. February 7.—The Creditors of Mr Patrick Inglis of Eastbarns were

preferred to the executors of the Lady Eastbarns, his mother, *quoad* all the lands disposed to Mr Patrick by his father. See 5th December 1671, [*supra.*]  
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ANENT the CUTTING of WOODS.

*QUÆR.* if a donatar to a ward or a liferent escheat may cut a whole wood, and apply the price of it to himself. Some think, if it be *sylva cædua*, he may cut it in hagggs,—*Vid. L. 30 D. de V. S. ibique interpretes.* But if it be a forest, he cannot otherwise cut it than the heritor was in use to do, or for the use of the ground, to repair tenants' houses, &c. or to sned them. This may also be demanded concerning a liferenter or wadsetter. See Craig, p. 218, Stair, *tit.* 14, § 23.  
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ANENT REMOVING WADSETTERS.

WHEN one would take the possession from a wadsetter upon the 62d Act Parliament 1661, he should offer caution, besides his own bond; and he should warn the wadsetter, forty days preceding Whitsunday, to remove, in the same way as one would do with his tenant. See 14th June 1671, *Lord Lovat.*  
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1699. February 7. The CREDITORS of RUTHVEN of DUNGLASS competing.

IN the case of the competition of the Creditors of Ruthven of Dunglass, between an infestment and an apprising; I hear that the Lords found, where a bond which is the ground of one's infestment, is prior to a comprising and the complete diligence following thereupon, and that the party is infest upon that bond before the compriser is infest; that this is sufficient to bring him in *pari passu* with the appriser. As also it was again found in the case of *William Maxwell* against *Sir David Dunbar.*  
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1679. February 8. ANABELL, ALISON, BESSIE, and JANE LOTHIAN *against* KATHARINE LOTHIAN and MATTHEW RAMSAY, her Husband.

[See the prior part of this Case, Dictionary, p. 5649.]

IN the action (mentioned 15th June 1678,) pursued by Lothians against Mr Matthew Ramsay and his wife; the probation anent the death-bed being this day advised by the Lords, they found the same fully proven, and therefore reduced the disposition. They craved the Lords would also reduce the disposition, which the pursuers had got, of that same date, from the same author, that there might be an equality and a *collatio bonorum.*

This the Lords refused, they not having so much as raised a reduction of it; but reserved it to them as accords.  
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