

possession of wair, prescribe it, because it was *sine titulo*; ergo he could not interrupt legally, and if he did it, it was only an act of ill neighbourhood; yet the LORDS found such an heritor, though wanting 'wreck and wair' in his charter, might stop and impede others from prescribing such a right on the shore of his own ground, and that his infeftment in the lands gave him a sufficient interest so to do. Then Monkton recurred to their clause *cum piscationibus*, as including the gathering of wair, as *majus sub minore*, as pasturage contains casting of divots, &c. But the LORDS found, that these was quite distinct, and that wair came not under the clause *cum piscationibus*. See PRESCRIPTION.

Fol. Dic. v. 1. 144. Fountainhall, v. 2. p. 73.

No 9.

S E C T. II.

Demonstrative or Taxative.

1624. January 22. DRUMMOND against DRUMMOND.

DAVID DRUMMOND deceasing in England, and leaving Archibald Drummond his executor, left in legacy L. 50 Sterling to be given to Patrick Drummond out of the readiest of the sums owing to him by the Laird of Spot. He pursues the executor, who *alleged* he ought not to pay him, because the sums owing by Spot were heritable, and so belonged to the heir.—THE LORDS found, That the wrong destination of the money should not frustrate the legatar, especially the pursuer offering him to prove that the executor had introritted with as many moveables as would satisfy the same.

Fol. Dic. v. 1. p. 145. Spottiswood, p. 194.

* * Durie reports the same case :

In an action Drummond *contra* Drummond, one David Drummond in his testament leaves the sum of L. 1000 in legacy to a legatar, to be paid out of another particular sum owing to the defunct, which sum, out of which it was left to be paid, was heritable; and thereupon the executor, who was convened for payment thereof, defending himself, that he ought not to pay it, being destinate out of an heritable sum, which was not testable;—THE LORDS found, That albeit the legacy could not receive effect, by payment out of that sum particularly, yet nevertheless that the legacy remained good, to affect the defunct's other moveables with the payment thereof, if he had as many as might satisfy the same; and therefore admitted to the pursuer to prove, that there was

No 10.

A legacy of a particular sum payable out of a certain subject, which was found to be heritable, was sustained notwithstanding against the executor; this being understood demonstrative only, not-taxative.

No 10. more moveables left by the defunct, and intromitted with by the executor, than might satisfy the foresaid legacy.

Act. *Craig.*

Alt. *Rollock.*

Durie, p. 99.

No 11.

An infestment of four acres of land, found to be demonstrative and not taxative; and therefore was sustained against a process of removing, the pursuer craving the possessor to be removed from all that was above four acres.

1630. February 2. DOUGLAS of Pumpharston against LYNE.

IN a removing, the defender defending with his infestment of the miln libelled, and four acres of land; and the pursuer passing from that, and desiring the defender to remove from all which should exceed four acres after metting.—THE LORDS found, That in the removing, the defender and his predecessors immemorial possession of the land, which they bruiked at four acres of land without interruption, ought to defend against this removing, albeit the excesce of the land possessed should exceed four acres, and should be more than six or seven; whereanent in this removing, the LORDS would take no trial by metting.

Act. —.

Alt. *Craig.*

Fol. Dic. v. 1. p. 145. Durie, p. 489.

No 12.

If to an infestment of lands, under a general denomination, be added a more particular description, expressing the names of the particular tenants possessing some of the lands only; this will be reckoned taxative, to limit the infestment to the lands possessed by the particular tenants enumerated, though the rent of the parts be not sufficient to pay the sum, for the security of which the infestment was granted.

1634. February 1. MURRAY against OLIPHANT'S WIFE.

SIR PATRICK MURRAY having obtained decret of removing against Mr William Oliphant's wife, for removing from the lands of Middleton and Powflat, she suspends, that she is infest in the lands and mains of Uphall in liferent, (she being now divorced,) of the which lands these are a part; and the party *answering*, That her infestment, albeit bearing 'the whole mains,' cannot extend to those lands contained in his decret, because the same bore, 'her to be infest in the whole mains, containing the lands underwritten, viz. (for these were the words 'of her infestment,) the lands possessed by patticular tenants, specially enumerated and exprest in the said infestment:'. And true it is, that these lands were not then, nor at any time before, possessed by these tenants; and so she cannot claim the same, seeing he offers to prove, that these lands were then possest by other tenants, viz. —And the suspender *answering*, That albeit some of the mains were possest by the tenants designed in her infestment, yet that was not enough to exclude her from the rest; for that word, (viz. possest by these several tenants,) is not of that force to take away the right of the rest of the mains from her; specially seeing, by her contract of marriage, she is ordered to be provided to the lands worth 20 chalders victual yearly; and wanting these lands controverted, she will inlack three chalders victual thereof.—THE LORDS, in respect of the said infestment, bearing the foresaid clause, viz. possest by the tenants specially designed therein, found, That the suspender's liferent could