

the earth covers their faults : Why may we not then fine him soundly, seeing you may kill ? Whereupon the Commissary thinking his fame and reputation touched, he put in a petition, craving reparation of the injury done him. And Foveran being thereupon cited, and no formal defence proponed, but only insinuations, that, if need were, they could be proven, though *veritas convitii non excusat* ; and that it was alleged to be the daily practice, in reasons of advocacy and suspension, to charge commissaries and other inferior judges with injustice, partiality, and iniquity in their sentences ; and these expressions were never quarrelled, nor made a crime : And to say a party capitulated with a judge to make him sharer, does not import his acquiescence, but only implies the party made such an offer and proposal : and if the judge rejected it, then he is wholly innocent :

The Lords would admit of none of thir excuses, but ordained him to come to the Commissary-court of Aberdeen, and crave him, publicly, pardon, under the penalty of £50 sterling if he failed ; also, to pay the Commissary 500 merks for his damages and expenses. Some thought the *palinodia* and recantation would go ill down ; but the Lords made it a part of his censure and punishment.

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1707. July 29. JAMES CARNEGIE *against* CHARLES CARNEGIE.

CHARLES and James Carnegies, sons of the deceased Laird of Phineven. Charles takes brieves of the Chancery, directed to the sheriff of Forfar, to serve himself heir to his father, on his mother's contract of marriage. James gave in a bill of advocation, craving the service might be advocated from the sheriff to the macers, upon irritancy, in respect their father, knowing the incurable palsy his eldest son laboured under, that he was neither able to speak nor walk, had disposed his estate to James, his second son, as most fit and capable to represent him, with the burden of an aliment to his elder brother, and wherein the second was infest : so this service was designed only to be a title to vex his second brother by reductions and other processes ; which ought not to be indulged nor encouraged.

ANSWERED,—My right of succession, *jure sanguinis*, can never be taken from me : However my father upon misprision has past over me, yet this cannot impede my service ; for, *1mo*, My father died last vest, and you are only infest since his death ; *2do*, Your right is base, and so I must be served in the superiority, if I get no more ; *3tio*, My infirmity is but temporary, and may be cured ; and so the cause of my father's preterition ceases ; and I may have children in marriage, who cannot be prejudged.

REPLIED,—The base infestment cannot be confirmed, which cuts off your right of superiority ; but, to take off all pretences, they are willing to hold him as heir and infest, and to produce the disposition from the father, and debate *instanter* ; and, if the elder brother reduce it and prevail, he offers to dispoise the estate to him : though the father is the fittest judge of his children's merits, and has kept within the line, he being a son of the same marriage ; whereas, the preferring a son by another bed would not be so favourable.

The Lords, in respect of the offer to sustain his title, advocated the cause to their macers, they signing their offer ; and named assessors for directing them, if any difficult points of law occurred in the service.

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1707. July 30. ELLIOT against THOMAS RUTHERFORD of that ilk.

THOMAS Rutherford of that ilk, having disponed some lands of Wells to Elliot, and likewise being debtor to Elliot, and charged ; he suspended on the reason, That he behoved to have compensation, because you have intromitted with a nursery, set by me, of young trees ; which he offered to prove was worth £500 Scots.

ANSWERED,—The lands being disponed to me irredeemably, with orchards, trees, and all other planting, the nursery fell under my disposition, unless they had been specially excepted and reserved : and, by the Roman law, *tit. De Rer. Divis. Sata et plantata cedunt solo ut pars fundi* : and, at this rate, *sylva cædua* might be pleaded as undisponed ; because it is designed to be cut and sold, and not to remain constantly on the ground.

REPLIED,—The design of nurseries is to transplant or sell them ; and not constantly to remain in the beds and seed plots where they stand, and are no more understood to belong to the buyer than the corns growing on the ground, and the hangings on the walls of the house, unless expressly mentioned : and Lord Dirleton thinks they fall under executry ; and about London there are nurseries worth many thousand pounds sterling : and, among ourselves, gardeners that have long tacks, plant nurseries, and sell them ; yea, remove them at their departure : And *Voet. tit. De Rer. Divis. sec. 13, 14*, tells, that in Flanders such plantations are reckoned amongst moveables, not being there *animo perpetuo remanendi*.

DUPLIED,—The common sense of all buyers and sellers has sufficiently explained the case : for, when I buy an orchard, I buy all therein contained, unless excepted ; otherwise I may be deprived of the use of my property, seeing they may not be fit for transporting before sundry years, being but lately sown ; especially when it was not the seller's custom to sell his young trees, but only brought them up to plant in his outfield-ground, and that there is a full adequate price paid for the whole. And the parallel of corns is not alike, for they are *inter fructus industriales* ; and the custom in Flanders is confessed to be *speciali legislatione*. But the clear rule of law is, *Quæ fundæ cohærent, pro immobilibus habentur*, and so *in metallis et lapidicinis, quæ cæsa et eruta sunt, mobilibus accensentur* ; but if they be still in the mine and quarry, unseparated, they are reputed *pars fundi*, and immoveable.

The Lords found that this nursery fell under the general words of the disposition, unless it had been specially reserved.

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