

daughters nothing ; which could never be my Lord Halcraig's design. Neither was this so unreasonable, to lay the debts on the tailyed estate, for much of it was contracted to purchase these tailyed lands of Milnton : and there is nothing more natural than for the price to burden the subject. And, after all, the eldest sister, coming in with the rest, will have better than 40,000 merks of her father's succession, which may well uphold a representation both for his name and arms. And this declarator now sought is neither heresy nor novelty ; for, on the 23d July and 21st November 1680, *Lady Margaret Cunningham* against *Lady Cardross*, it was found, an heir of line might seek relief of the debts against the heir of tailyie.

DUPLIED,—The *cortex verborum* is not to be noticed, but the reason, design, and meaning of parties must be followed : and, whatever the clause in the literal grammatical sense may sound, as to the burdening of the tailyie with the debts, yet that can never cut them off from their relief competent in law : and the younger daughters will have suitable portions when the debt is paid off the whole head.

The Lords thought the clause strait ; and therefore, before decision, named some of their number to endeavour to settle the parties, that each of them may get a competency, if possible.

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1708. February 10. VANS and CRAWFURD against WILLIAM KENNEDY of DALJARROCH.

DAVID Ferguson, in Air, having a stock of 1400 merks in the African company, and he being debtor by bond to Sir John Ferguson, wherein another Ferguson and one Macjarrow of Bar are bound conjunctly ; William Kennedy of Daljarroch pays Sir John, and gets an assignation to the bond, and thereon arrests the money in the Commissioners of the Equivalent's hands ; and likewise gets a voluntary assignation from the said David Ferguson to his share, and intimates the same duly. David being likewise debtor to Vans and Crawford, they raise horning on their bond, and arrest in the Commissioners of the Equivalent's hands ; but, when the multiplepointing comes to be discussed, Daljarroch is preferred, both on his prior arrestment and on his first intimated assignation ; therefore Vans and Crawford insisted, That, seeing he got payment of his whole debt, he might assign them against the other two co-principals, that they may not totally lose their debt.

ANSWERED,—I can never be obliged to assign, but only to discharge ; because any payment I have got is out of the principal debtor's effects ; especially seeing one of them is turned insolvent and broken.

REPLIED,—The Lords have demurred to ordain a creditor to assign, where he instructed a prejudice, such as, that he had other debts unpaid ; but whenever his whole interest is satisfied and extinct by payment, they overruled that invidious refusal of assigning : for, in all competitions, where a creditor has more securities than one, and, by affecting part of the subject, is preferred ; because he thereby debar the other creditors, therefore it is but just that he assign what farther security he has, that thereby the other postponed creditors may operate their own payment the best way they can : and that one of them is failed, is our prejudice and loss ; but we will take our hazard.

The Lords ordained Daljarroch to assign *quoad* the other two parts, with warrantice from his own fact and deed allenary; for it appeared to be collusion in him to gratify the common debtor. *Vol. II. Page 428.*

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1708. *February 21.* ELIZABETH BLAIR *against* HARY HUNTER of KIRKTON, her Husband.

ELIZABETH Blair pursues Hary Hunter of Kirkton, her Husband, for an aliment, in regard she could not live with him in safety, because of his outrageous barbarous cruelty towards her. A probation being led of the maltreatments; they were found to be very gross, by trailing her through the floor by the hair of the head, drawing his sword to her, beating and bleeding her, &c.

ALLEGED for him,—If he had been allowed a conjunct probation, he could have exculpated himself, by proving such provocations as would have made her unworthy of the benefit or protection of law,—she being Captain Blair, at the Clock-miln in the Abbey, his daughter, *mali corvi malum ovum*; and he trepanned when drunk to marry her, and then ensnared by her father in all his debts, and so rendered miserable: and if passion, drink, and weakness, did sometimes transport him, he may be excused; but in law she can have no separate aliment by deserting his house, because the most of the violent acts condescended on were in 1700, and, for many years after that, they cohabited together in a peaceable manner, and since that time she has bore him children; and so all these deeds are buried in the grave of oblivion; as is clear from the *tit. De Injuriis, sect. ult.* that *dissimulatione tollitur et abolitur injuria*; and which Vinnius, in his Commentary, does not only explain of verbal, but even of real injuries, by beating and wounding: Likeas, they are all prescribable *intra annum, si injuriam in animo suo non revocaverit*; l. 5, C. *De Injuriis*: so that Kirkton's wife had plainly forgiven and passed from all the bad usage she had met with, by living in a friendly peaceable manner, for several years together, after these outrages now complained of; so that he hath both dissimulation and the annual prescription for him.

ANSWERED,—If modesty and respect to her husband's honour had made her so long in complaining, that could never be detorted to her prejudice; especially seeing the cruelty had made late eruptions like *Ætna*; for two witnesses bore, that, in January 1707, he had debarred her from her chamber, and made her lie on straw in the kitchen, and used other deeds of violence, which must be connected with the former; and he was so furious in his temper, that it was impossible for her to cohabit with him in safety of her life. In the reasoning, it was remembered by some of the Lords, that, at the Privy-Council, in the *Lady Royston's complaint against Captain Hardy, her Husband*, who having beat him with her slipper, he held her face to the fire till her eyes were like to start out, and yet he was only imprisoned for it one night. See it in Sir George Mackenzie's English pleadings.

The Lords thought the usage in the probation incapable of any justification, and below the character of a rational man, though provocations had preceded, as they were not proven; and therefore found she was not obliged to return to his family, but ought to have a separate aliment apart.