

service as heir of provision : and the first time this was sustained, was in Carnegy of Kinfauns' process, and has not been uniformly so decided since ; especially seeing it is a passive title, and the right of blood is not enough : Yet, in regard it was so found in the Act, the Lords sustained it here, without any farther ; though some thought a cognition by sentence, at the least, necessary.

*Vol. II. Page 574.*

1710. *June 9.* HUGH PATERSON *against* WILLIAM GORDON and his CREDITORS.

IN the ranking of the creditors of Balcomy, and dividing the price, Hugh Paterson insisted on this ground, That Mr William Morton, once minister at Leith, was a creditor to Lermonth of Balcomy, both by an infestment of annual-rent and a comprising ; and left four daughters : the rights of three, Mr William Gordon acquired ; the fourth disposed her part to Hammond Newby and Elisabeth Herbert her mother, from whom, by progress, Mr Paterson derives right ; and so craves preference *quoad* the fourth part of that comprising.

Objected by Mr William Gordon and his Creditors, That Elisabeth Morton's assignation to Hammond Newby, her step-father and her mother, did only convey her portion-natural in the rights of the lands of Balcomy ; which, by the grammatical signification of the words, can import no more but the disposing her legitim, which will only carry the bygone annualrents of that debt preceding her father's decease, but never convey the principal sum, to the prejudice of her three sisters, the other heirs portioners, to whom her share falls, she having died unmarried. *2do*, As this assignation is merely gratuitous, without any onerous cause, so it is evidently on death-bed, being a disposition of her goods and gear ; and mentioning her very wearing clothes, and the habiliments of her body, without reserving her liferent-use thereof ; which none but a person on death-bed would do. *Stio*, The assignation being to Hammond, her step-father, and Elisabeth Herbert her mother, and their heirs, it is to be presumed the fee was designed to be stated in the mother, whom she would rather gratify than the husband, who was a stranger to her : And so Paterson's right from the husband is *à non habente potestatem*, he not being fiar.

ANSWERED to the *first*,—The dispositive clause running in thir terms, That she assigns all portion-natural due to her, as one of the four heirs-portioners of the estate of Balcomy, with all right she can pretend thereto, will certainly carry her fourth part, both stock and annualrent. As to the *second*,—It was denied that the same was subscribed on death-bed, and they cannot prove it. To the *third*,—Law is plain, that, in all dispositions to a man and his wife, *potior est conditio masculi* ; and whatever presumption may be, where the right is from an ascendant to a descendant, who had the hope of succeeding however, yet it does not hold in rights made by descendants in favour of their parents ; which is the case in hand.

The Lords repelled the objections, and sustained Paterson's right ; but found the second allegiance relevant, that it was granted on death-bed, at which time she could not prejudge her sisters ; and admitted the same to probation.

*Vol. II. Page 575.*