

ing for altering that interlocutor, upon the *species facti*, not upon the general point. The bills accepted by Weir, and discounted by the company, did not bear for value in goods.

BARJARG. The world can have no rule to walk by but that of the practice of the company.

AUCHINLECK. The general point is not the thing at all. One man cannot bind another in company without a commission; but here there is a company which has been in use to allow Weir to take up money by granting bills, and those bills paid without objection. No recourse need be had to a general point where there is a declaration so express of the company's purpose. If a servant has been in use to purchase, upon credit, necessaries for his master, and the master has been in use to pay, may the master stop short and refuse to pay? The company must pay this debt, as they have brought it upon themselves, by granting Weir such credit; otherwise Dewar would lose his money upon the faith of the company.

COALSTON. If the interlocutor of the Ordinary be adhered to, an end is put to trade: consent may be given either by implication or expressly. I shall admit that there are no express powers, but there are clearly implied powers. Had the whole bills been for the *price of goods*, there might have been some difficulty; but most of the bills bear for *value received*, and so the company led the world to believe that Weir had power to borrow money. No man is bound to look into contracts of copartnery or the books of partners. Besides, the contract bears only, that their books are to be patent to the partners. I am also clear upon the special circumstances of the case: Mr Patrick Miller himself advanced money to Weir upon the firm of the company. The contract, then, was deviated from. Weir was bound, by the contract, not to make purchases for more than L.100; yet the bills produced show that this also was deviated from: much larger sums have been paid for goods.

At the first hearing: *Diss.*—Kaimes, Pitfour, Gardenston, Kennet. *Non liquet*,—Auchinleck. *Not present.*—Barjarg, Alemore, Coalston, Milton.

At the second hearing: *Diss.*—Kaimes, Gardenston. Justice-Clerk did not vote on account of relationship.

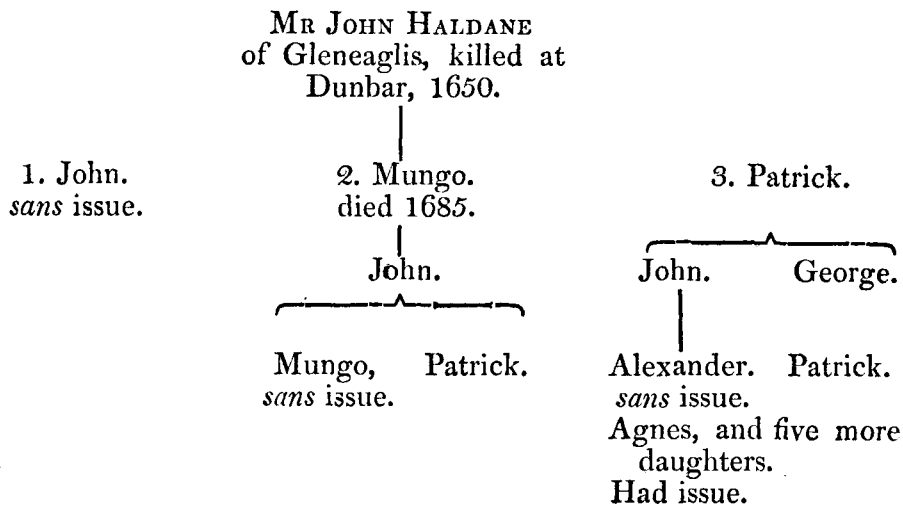
1766. November 27. MR PATRICK HALDANE, Advocate, *against* ANN HALDANE, and the other Five Daughters of Haldane of Lanark.

#### SERVICE OF HEIRS.

Effect of a General Service, *tanquam legitimus et propinquior hæres* to a father.

[*Faculty Collection, IV. p. 379; Dict. 14,443.*]

FOR understanding the question between the parties, the following genealogical tree is necessary:—



About the year 1450, John Haldane of Gleneaglis acquired the estate of Lanark, by his marriage with the eldest daughter of Monteath of Ruskie. In 1508, the estate of Lanark was united with the barony of Haldane. In 1650, Sir John Haldane of Haldane and Gleneaglis was killed at the battle of Dunbar, fighting in the cause of Charles the Second. He left three sons, John by his first marriage,—Mungo and Patrick by his second marriage with the widow of Sir Robert Arbuthnot of Arbuthnot. John died without issue. The pursuer is heir-male and of line of Mungo. The defenders are heirs of line of Patrick. This appears from the genealogy prefixed. There were various debts and diligences affecting the estate of Gleneaglis, comprehending Lanark. More particularly, Patrick, the third son of Sir John Haldane, had right to the following debts, in manner following:—On the 31st December 1655, he obtained an heritable bond for 3000 merks from his elder brother John. In virtue of this, he was infeft in a part of Lanark. On the 5th March 1678, he acquired right to a decret for 12,000 merks, as the single avail of the marriage of John Haldane of Gleneaglis, to which Sir William Purves had a gift. Having deduced an adjudication against John, of the lands of Lanark and others, lying within the barony of Haldane, for the said sum,—past a charter and taken infeftment,—he was, on the 12th August 1668, preferred to the maills and duties of these lands. On the 18th February 1671, he acquired right to an apprising of Haldane and Gleneaglis, comprehending Lanark, deduced in 1654, for 9560 merks, and to a gift of recognition of Lanark, dated in 1670. On the 12th and 19th July 1672, he acquired right to a like apprising deduced in 1654, for 8376½ merks, on which charter and seasine had followed. Thus, besides the gift of recognition, Patrick had right, in 1672, to the following capital sums affecting the family estate, wherein Lanark was comprehended:—

Gift of single avail,	12,000
1st apprising, 1654,	9560
2d apprising, 1654,	8376½
Bond 1655, - -	3000
In all -	<u>32,986½</u> merks.

It is said that at that time the rent of Lanark amounted to 71 bolls meal, and L.76½ Scots, in money. This, converting the meal at L.6 per boll, is about 1563 merks per annum; at twenty years' purchase it is 31,260 merks; and, as in 1672, no land was sold at so high a rate as twenty years' purchase, it is plain that the debts in Patrick's person did certainly exceed the value of Lanark. John, the eldest son of Sir John, died without issue, and was succeeded by Mungo, his brother consanguinean. On the 13th February 1673, Patrick Haldane, for the love, &c. which he had to Mungo, his brother, and for other good respects, causes, and considerations, disposed the lands of Haldane and Gleneaglis, to which he, Patrick, had right by the apprisings and gift of recognition, to Mungo, and the heirs-male of his body, and assignees whatsoever; which failing, to him, the said Patrick, and the heirs-male of his body, and assignees whatsoever; which failing, to the said Mungo's nearest and lawful heirs whatsoever; which failing, to his heirs whomsoever, the eldest female succeeding without division; *Proviso*, that the whole heirs shall assume the surname and carry the name of Haldane of Gleneaglis. In consequence of this disposition, Mungo Haldane did, on the 16th April 1673, obtain a charter of the barony of Haldane and Gleneaglis, to himself and the heirs-male of his body, and assignees whatsoever; whom failing, to Patrick Haldane of Lanark, his brother; whom failing, to the other heirs mentioned in Patrick's disposition, 13th February 1673. This charter contains a *novodamus*, and the holding was thereby changed from simple to taxed ward. On the 29th January 1675, a contract was entered into between Mungo and Patrick. It proceeds upon the narrative of the charter, and mentions that the charter proceeded upon the resignation of Mungo, and of Patrick his brother. It adds, that the lands therein underwritten, being part of the barony of Haldane, belonged to the said Patrick Haldane; and that it was agreed betwixt the brothers, that, after expeding the foresaid charter and infestment, Mungo should dispoise back the lands following, to Patrick, and his heirs and assignees, after specified, to be held either taxt-ward of the king, or in feu-farm of Mungo, his heirs and successors, in Patrick's option. Mungo, therefore, disposed the lands of Lanark, and others, to Patrick, and the heirs-male of his body, and assignees whatsoever; which failing, to return to Mungo and the heirs-male of his body; which failing, to the heirs-female, lawfully begotten of Patrick,—the eldest succeeding without division; which failing, to Mungo, his nearest and lawful heirs-male whatsoever; which failing, to his heirs whatsoever. For their better security, Mungo retrocessed Patrick, his heirs of tailie, and assignees, to all the apprisings, &c. On the 16th December 1673, Patrick acquired right to an apprising of the baronies of Haldane and Gleneaglis, deduced in 1654, for 2720 merks. In 1685, Mungo died, and was succeeded by his son John. In 1686, Patrick died, without having made up any titles to the estate of Lanark. John Haldane, his son, was, at that time, an infant under the tutory of John the son of Mungo. On the 6th December

1693, John, the son of Patrick, was, by the direction of his tutor, John, the son of Mungo, served nearest and lawful heir to his father. Before John made up titles to the estate, he acquired certain incumbrances affecting it; particularly, 1st January 1711, a disposition, to himself and his heirs and assignees, of the lands of Saughans, which had been wadsetted in 1654 for 1500 merks: 3d and 7th December 1719, a like right to the half of the lands of Cassivoir and Drumniverig, which had been feued by his grandfather in 1627. On the 26th July 1726, he obtained a charter from the crown in favour of himself, and the heirs-male of his body, and assignees whatsoever, &c. in terms of the contract 1675. On the 27th October 1726, he was infest. After his titles were completed, he acquired the following rights:—3d January 1740, the parsonage lands of Ruskie and Lanark; 22d November 1729, Miln and Milnlands of Lanark; 23d February 1764, vicarage teinds of certain parts of the estate of Lanark. He took the dispositions to all those parcels, either to himself and his heirs, or to himself and his assignees.

John Haldane, and his eldest son, Alexander, engaged in the rebellion 1745. They were both excepted out of the act of indemnity, and *billa vera* was found against both. On the 3d December 1746, John executed a deed, whereby, upon the narrative of love and favour, he disposed the estate of Lanark to his second son, Patrick. This disposition bears an assignation to the writs, after the granter's death; and it is thereby declared, that he had delivered the whole writings of the estate to a trustee, and he dispensed with the delivery to Patrick himself. In 1750, John, and his son Alexander, against whom *billa vera* had been found, went to France, and afterwards returned to Scotland. On the 4th December 1757, Patrick executed a disposition in favour of his six sisters, equally amongst them, and their heirs and assignees, equally among them; reserving his own and his father's liferent, and a power to alter. In 1761, Patrick died. In 1763, Alexander died. In 1765, John died. In 1765, Mr Patrick Haldane was served heir-male and of provision in general to Patrick Haldane of Lanark, his grand-uncle, that he might thereby establish in himself a right to the procuratory in the contract 1675. It was agreed that all objections, at the instance of John's daughters, should be reserved. Mr Haldane, having thus made up his titles, insisted in a reduction of the disposition granted by John to his son Patrick, and by Patrick to his sisters. The sisters, in their turn, insisted in a reduction of Mr Haldane's rights. The processes were conjoined.

On the 17th December 1765, The Lord Auchinleck, Ordinary, pronounced the following interlocutor:—“Finds, that, by the contract 1675, Patrick Haldane, and his heirs, had the absolute and unlimited right to the estate of Lanark, and were at full liberty to alter the order of succession, and dispose the estate to whom they pleased; and that, in respect the estate is, by that contract, confessed by his brother Mungo, the other party contractor, to have been antecedently the property of Patrick, and to have stood only in his, Mungo's, person, as a trust for behoof of Patrick, and there is no restriction from altering the order of succession in the deed,—that it has no relation to a settlement made by Mungo, so is not of the nature of a mutual tailyie; and, in respect the clause of return to Mungo, and the heirs-male of his body, is only failing Patrick, and the heirs-male of his body, and assignees whatsoever, finds, that, as Patrick did not expedite a seasine on the precept contained in the said contract, John Hal-

dane, his son, upon the father's death, made up a proper and legal title to the personal right, which was in his father, by obtaining himself served and retoured heir in general to his deceased father; whereby he is cognosced *legitimus et propinquior hæres dict. Patricii Haldane, ejus patris*, which ascertained upon record not only his universal right, but also that he was heir-male of the body of Patrick, and superseded the necessity of a service as heir-male: And finds the disposition by John Haldane to his second son Patrick, his heirs and assignees whatsoever, bearing delivery to a trustee, and dispensing with the not delivery to Patrick himself, habilely conveyed the estate to the said Patrick, and his heirs general, which must now be taken up by the heirs general of Patrick, or by his assignees. And as the six defenders against Mr Patrick Haldane's reduction, who are the daughters of John, and sisters of Patrick, are both heirs to Patrick their brother, and have a disposition from him, assoilyies them from the reduction brought against them by Mr Patrick Haldane; and finds he has no right to the lands and estate of Lanark, and others, described in the summons and in the title-deeds of that estate; but that the same belongs to the said six heirs and disponees of the deceased Patrick; and decerns and declares accordingly.

PITFOUR. Before the year 1738, this difficulty did not occur; it then occurred in the case of *Eshieshiels*. A service of heir-male to his father did not carry a right as heir-male of a marriage; for the one title did not necessarily imply the other: but here *legitimus et propinquior hæres patri*, implies heir-male, though it does not necessarily imply heir-male and of line: Thus, suppose a man to have two sons, the eldest dies, leaving a daughter; the daughter will be the heir of line, the second son will be heir-male. In the case of *Sir Robert Hay of Limplum*, it was found that a general service might imply *of provision*, though there was no reference to the provision.

PRESIDENT. Here no mistake could be: *constabat* what the person served was. Dangerous to overturn investitures upon specialties.

The Lords adhered without a vote.

For Mr Haldane, H. Dundas. *Alt. D. Græme*.

1766. December 2. ARCHIBALD STEWART *against* THOMAS FOGGO and WILLIAM GALLOWAY.

#### LEGAL DILIGENCE.

Poinding by an indorser, in name of an indorsee, knowing him to be dead, is null, and not even capable to afford retention.

[*Faculty Collection, IV. p. 277; Dictionary, 8136.*]

PITFOUR. Poinding is null, as executed in name of a dead person. Retention is not a good plea. Compensation, and even retention, may be good