1774. *June* 28. THOMAS POTTS and OTHERS *against* The TRUSTEES of the TURNPIKE ROADS in the Shire of Roxburgh.

JURISDICTION—HIGHWAYS.

THIS case depended chiefly on matters of fact. Some important questions however occurred in it, and received determination.

The Court was of opinion, that it had a jurisdiction to inquire whether the trustees had exceeded the powers committed to them by statute.

The Court was also of opinion, that any person who *touched* the turnpike road, was bound to pay toll; and that there was no legal difference between going in the road a yard, or a hundred yards, or a mile: that, in such case, the only remedy lay in the equitable power of composition intrusted with the commissioners.

Act. Ilay Campbell. *Alt.* H. Dundas.

Reporter, Coalston.

1774. *June* 28. GEORGE BOYD of Parkhead *against* JOHN BOYD of Threaprig.

CONQUEST.

A father had taken a disposition in favour of himself and his wife, in conjunct fee and liferent, for the wife's liferent, and to their son in fee, with a reserved faculty to burden without the consent of either. Afterwards, he took a disposition to other lands in favour of himself and his wife, in liferent, and to their son in fee; whom failing, to the father's nearest heirs or assignees in fee. On the failure of father and son, the succession devolved on the heir-of-line, not of conquest.

[*Faculty Collection, VI.* 315; *Dictionary,* 3070.]

MONBODDO. Here is a charter of resignation, not a confirmation or precept of *clare constat.* I make no doubt that the father meant to make up his titles by a charter of confirmation; but we must not overturn the law to sanctify his blunders: my doubt is, whether there is not a *præceptio hæreditatis* in the son? The father meant to save the son the expense of a service.

PRESIDENT. It would be dangerous to go against the words of a deed.

COALSTON. The deed might have been liable to a reduction on the Act 1621; but then the son would have been liable *in valorem* only, not on the passive title of *præceptio hæreditatis.*

PITFOUR. It is a principle in law, that *duo non possunt esse domini ejusdem rei eodem tempore in solidum.* In the case of *Captain Livingston* against *Lord Napier,* the Court adhered strictly to feudal forms, and the House of Lords affirmed its judgment.

[He said a great deal more; but his voice is so low that no one could hear his argument.]

On the 28th June 1774, "The Lords preferred the heir of conquest."

Act. W. Baillie. *Alt.* R. M'Queen.

Reporter, Coalston.

1774. *June* 28. JOSEPH CAVE and his ATTORNEY *against* The GOVERNORS of the MERCHANT MAIDEN HOSPITAL of Edinburgh.

HEIR APPARENT.

The Heir Apparent of a person originally vested with a right of presentation to an hospital, by the deed of a third party, was found entitled, without a service, to present upon a vacancy.

[*Faculty Collection, VI.* 318; *Dict.* 5290.]

PITFOUR. This right of presentation may be assimilated to a title of honour, which infers no passive title.

COALSTON. I should have some doubt whether a service, in this case, would not imply a passive title; but I do not think a service necessary. When Mr Cave gives a presentation, he does it *suo periculo.*

N.B.—In this case, there was a material circumstance which escaped the parties. A right of presentation is given when a donation amounts to L.2400, or 3600 merks: *Here* the donation was only 2000, and consequently Cave had no pretence for presenting.]

Act. Ilay Campbell. *Alt.* J. M'Laurin.

Reporter, Gardenston.

1774. *March* 1. PATRICK HERON of Heron, Esq. *against* DOCTOR ANDREW HERON.

INHIBITION—APPEAL.

After appeal taken from judgments of this Court, and served *hinc inde,* it is competent to the pursuer to use an Inhibition against the defender as on a dependance.

[*Faculty Collection, VI. p.* 320; *Dictionary,* 7007.]

HAILES. The order of the House of Lords, 1709, respects not inhibitions; so, by authorising such letters, we offend not against that order. The House