

1709. *June 24.* LADY ORMISTON and HUSBAND *against* The LAIRD of GRANT.

LORD Prestonhall reported the Lady Ormiston and her Husband against the Laird of Grant. Rait of Hallgreen and Grant were debtors to the deceased Lord Whitelaw; and this debt being assigned by him to his Lady, she and her present husband charge Grant, and denounce him, and take the gift of his escheat; and pursuing a general declarator, it was OBJECTED,—The execution of the horning was null; because he was not denounced and registrate at the head burgh of the regality within which he dwelt, conform to the 268th Act, 1597; in so far as it was executed at Cromdale; whereas, the head burgh of this regality is declared to be the Castletown of Freuchie, now called the town of Grant.

ANSWERED,—Ought to be repelled; because, by the 43d Act, 1455, all regalities are discharged, except given by deliverance of Parliament; which this is not. And, though there be a subsequent ratification of Parliament, *anno* 1696, yet that is but *periculo petentis*, the Act requiring they should be granted in plain Parliament; and the Lords have sustained inhibitions, hornings, and other diligences against persons living within regalities, though not executed at their market-crosses, but only at the head burgh of the shire, where the custom has not been *in viridi observantia*; as was found 12th January 1672, *Scot* against *Boyd*, though it was not executed at the Thorn of Torphichen; and, 11th January 1677, *Scot* against *Dalmahoy*. Though Bavelaw lay, by annexation, within the principality of Renfrew, as holding of the Prince of Scotland, yet a denunciation at the market-cross of Edinburgh only was sustained, in respect of its great distance from Renfrew, and the creditor's probable ignorance. And the like as to the regality of Drem in East Lothian, as the head burgh of the regality of the Earl of Haddington's temple lands. Likeas, Grant's regality being but a late erection, it has scarce come in observance; and being erected within the heritable sheriffship of Murray, there was a reduction intended against it, which was remitted to the Parliament, and there depends.

REPLIED,—This arguing would annul the most part of the regalities in Scotland, for few of them are granted in plain Parliament: and this being objected against the Duke of Queensberry's regality of New Dalgarno, at its passing in Exchequer, was repelled, as Sir George Mackenzie observes on that act. And the sheriff's raising a reduction of it takes not away the exercise of his jurisdiction *medio tempore*; and it is offered to be proven that diligences are executed at that place, and that a register is kept of the same.

The Lords, before answer, resolved to take trial what has been the custom of executing diligences within this regality, and if they have been in use to be registrate within that bounds, before they would sustain the nullity of the horning.

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1709. *June 29.* PATRICK GORDON of MYRETON *against* The CREDITORS of NAIRN of SAINTFORD.

In Saintford's contract of marriage there is a clause, that either the lands are

already, or may be, tailyed to the heirs-male ; in which case, if there be only daughters procreated, they will be excluded from the succession ; therefore, he obliges himself to pay to the said daughters the sum of 18,000 merks at their age of fourteen, with annualrent thereafter, and which sum they shall accept in full satisfaction, and shall be obliged to renounce and denude in favours of the heir of tailye. Saintford dying, and leaving only one daughter of this marriage, and she being married to Captain Patrick Gordon of Myreton, he finding that the lands held ward, and were recognosced, he procures a gift of recognition ; and, pursuing a declarator, and for maills and duties, he insisted, *primo loco*, to affect and burden the lands with the £1000 sterling provided to the daughters of that arriage, the case having existed that there were no sons.

ALLEGED for the other Creditors,—That the case wherein the £1000 sterling was provided to the heirs female of that marriage had never existed ; seeing, by the narrative of that clause, it was only to be due to the daughters in case they were debarred from the succession by a tailye of the said barony, made or to be made ; but, *ita est*, it is not pretended that the said condition was ever purified, or that ever the estate was tailyed to heirs-male ; in which event only they were to have right to the said L.1000 sterling. And so the daughter, being heir of line, has right to the estate of Saintford ; and, if it were not exhausted with debt, might enter, there being no tailye to debar her : and, if she find that succession not only unprofitable but dangerous, yet she may not repudiate it, and retain a faculty of electing the L.1000 sterling provision, to which she can never recur, it being extinct by his not making a tailye.

ANSWERED for the Daughter,—That the narrative and supposition of a tailye is fully cleared by the subsequent clauses, making the L.1000 sterling payable at a precise determinate time, with annualrent thereafter, and execution to pass against the father for implementing the same ; which is impossible if it had been conditional. And the daughter has her election to betake herself to the estate, or to the foresaid provision ; as was found, *26th July 1677, Stevenson against Stevenson*.

REPLIED,—It is against the conception of the clause, the meaning of parties, and the analogy of law, to make the daughters creditors in that sum, unless a tailye were produced to debar them from the estate ; and so it was decided, in a parallel case observed by Dirleton, *20th June 1672, Gray against Forbes*.

The Lords, by a plurality of seven against six, found the daughter was not a creditor in that L.1000 sterling obligation, which was only conditional, in case she had been debarred by a tailye ; and therefore preferred the other creditors to her, unless she can prove there was a tailye. *Vol. II. Page 508.*

1709. *June 30.* SIR JAMES HAMILTON'S CHILDREN *against* SIR WILLIAM MENZIES.

THE Children of Sir James Hamilton, Lord Halcraig, as executors to him, pursue Sir William Menzies, their uncle, for intromission with sundry of their father's debts, and particularly for payment of L.1500 Scots contained in a ticket granted by him to Lord Halcraig in April 1698.