

1673. *February 13.* KATHERINE JACK, and WALTER ROBERTSON, her Husband, *against* MARGARET JACK, and ISOBEL DOUGLAS, Daughter to JOHN DOUGLAS, her Husband.

IN a reduction of a contract of division, betwixt Margaret, Isobel, and Katherine Jacks, three daughters of Patrick Jack, their father; at the instance of Katherine, the second, and Walter Robertson, her husband, against Margaret, the eldest sister, and Isobel Douglas, daughter to John Douglas, her husband, upon minority and lesion; in so far as their father, being obliged, by contract of marriage, to pay the sum of 8000 merks, in tocher with Margaret to John Douglas, the said 8000 merks was first totally taken off the father's estate, and the remainder only divided in three parts equally amongst the three sisters, whereby the two younger were prejudged; seeing the said tocher ought to have been satisfied out of the portion due to the said Margaret, unless she had offered to confer and renounce the said tocher, and come in *pari passu* with the rest of her sisters. Likeas, in the said reduction, the contract of marriage foresaid was called for to be reduced, upon this reason,—That the father, Patrick Jack, had made a disposition of the whole estate and fishing that he had, to his three daughters, before the contract of marriage with John Douglas; and therefore he could not thereby burden his estate with that posterior debt, for security whereof he had granted an infestment out of the salmon-fishing formerly disposed to his three daughters; being denuded, as said is.

It was ANSWERED for the said Margaret, and her daughter, to the *first* reason of minority and lesion,—That John Douglas, by his contract of marriage, being a most lawful creditor, the tocher, being a most favourable debt, was justly taken off the whole estate before division, seeing the whole sisters or their heirs were equally liable to him; and if he had assigned the same, or the tocher had been comprised from him, they would undoubtedly have forced the three sisters, as heirs-portioners, and representing their father, to make payment of the said tocher equally, *et pro rata*. Likeas, the said three daughters, being all served heirs-portioners to their father for fulfilling the said contract of division, they could not now quarrel any deed of their father's, but were all liable to his debt. It was ANSWERED to the *second*,—That the disposition made by the father, albeit prior to the contract of marriage, was but a latent deed, and never delivered in his own time, and could not prejudge a creditor; and the pursuer, being served heir to her father, would never quarrel the same, nor the security given out of the salmon-fishing for the said tocher, whatsoever they might pretend upon the disposition, if they had not been served heirs; yet, being heirs, they can quarrel no deed of his which may burden that disposition.

It was REPLIED, That the first reason of reduction was relevant, notwithstanding of the answer; because, prior to the contract of marriage, the whole daughters became lawful creditors to their father, after which he could not prejudice any of them of the third part of their estate disposed: and albeit, they were all served heirs, yet, as the two younger daughters were thereby obliged not to quarrel the tocher granted to the eldest,—so the eldest, as being likewise served heir, was obliged to warrant this disposition made to her and her other two sisters; so that her tocher ought to be taken out of her part and portion, otherwise that portion would be liable to them, either for relief of her own tocher, or to refund as much as was due to her husband as a lawful creditor. It was RE-

PLIED to the second,—That they offered to prove that the disposition was truly delivered by the father, in his own time, to the uncle of the three daughters on the mother's side.

The Lords did find, That John Douglas, being a lawful creditor, so that, if his marriage had been dissolved, without children, by the death of his wife, he, or any creditor having right from him, would undoubtedly have made the surviving heirs liable for the whole debt; so the contract of division taken off the tocher, as affecting the whole estate before division, could not be reduced upon minority and lesion,—his wife's third being liable thereto proportionably with the rest. But, in regard of the prior disposition made to the whole three sisters, which the said Margaret, being served as heir, was obliged to warrant, they found, That the two youngest sisters had good action of relief against their eldest sister, in so far as their two parts, or they themselves, could be distressed for more than two parts of the tocher; which, in effect and upon the matter, was to assoilye from the reduction of the contract of division, as having taken of the tocher granted to the eldest, as a just debt of the whole three sisters, they were equally burdened therewith: which was just, they being all served heirs to their father; whereas, if they had held themselves with the disposition, and had not been heirs, the eldest sister's portion could only have been liable for her tocher.

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1673. February 14. The EARL of KINGHORN *against* The EARL of WINTON and MARSHAL.

THE Earl of Errol, having sold to the Earl of Marshal the lands of Reidcleuch, whereof George Mowat was tenant, from whom the Earl of Errol had borrowed the sum of 2000 merks, and given bonds for it as principal, and the Earl of Kinghorn being then his tutor, as cautioner for him; they, by the contract of alienation, did take the Earl of Marshal as principal, and the Earl of Winton as cautioner for him, obliged to relieve them of the said bond: notwithstanding whereof, Kinghorn, being pursued at the instance of the relict of Sir George Mowat, as having right, by progress, to the said bond, was decerned and forced to make payment. Whereupon, having intented action against the Earl of Winton for repayment of the said sum, upon the foresaid bond of relief;—

It was ALLEGED for the Earl of Winton,—That Kinghorn could not pursue upon the bond of relief, because he did not intimate his distress, which, if he had done, the defender would have furnished him with an unanswerable defence, *viz.*—That George Mowat, to whom the bond was granted, was debtor in as much to the Earl of Marshal, in so far as, after the right made to him of the said lands of Redcleuch, he possessed the same so many years as would amount to more than the sums contained in the bond.

It was REPLIED, That the defence, resolving in a compensation, could not be admitted; because it was not liquid by a decret, neither was it *inter easdem personas*, he being only debtor by his possession to the Earl of Marshal or the Earl of Errol, but noways to the Earl of Kinghorn, who did pursue upon his bond of relief.

The Lords, in respect that Kinghorn had not intimated to them his distress, found, That the Earl of Winton ought not to be prejudged, if he had any just