diligence, which can apply to the present case. A prior adjudger, by entering into possession, excludes a second adjudger, who has a right to the subject as well as he; but no creditor has any right to the debtor's escheat but the creditor in the horning, who, by entering into possession, excludes nobody; and so, by no rule of law, can be obliged to do diligence.

2do, As to the backbond, the donatrix was only bound to denude in favour of the other creditors, so soon as she was paid; which she was now ready to do; that there was no mention of diligence, or of the gift being in trust, or for the behoof of any body; that Mrs Liberton is the first grantee, and so must be supposed to be more favoured than the other creditors, who are only reversional grantees; but, according to the pursuer's construction of the backbond, the gift would be so far from being a favour to the defender, that it would be highly detrimental and prejudicial to her; for, if any body else had got the gift, she would have been secure of her payment without trouble and risk, whereas, by being herself donatar, the only thing she gains is, to be made factrix and manager for the other creditors, liable to do diligence, and to account for omissions.

The Lords declined to give their opinion upon the general point, whether a donatar of a liferent escheat, in such a case, is obliged to do diligence at all, or if he is obliged to do diligence, what diligence? But the majority were of opinion, that the obtaining a gift of liferent escheat was no step of diligence; that the King was absolute proprietor of the escheats which fell to him, either *jure coronæ* or as superior, with the burthen always of the debt in the horning; and that the other creditors had no right at all in the escheats. They seemed all, however, to be of opinion, that the donatar, in such a case, was obliged to some diligence, though some thought that he was only liable for gross negligence, *præstare latam culpam quæ dolo comparatur*. As to the particular case of Mrs Liberton, they found she had done sufficient diligence, and so assoilyied from the pursuit.

1739. *January* 12. Lord Wigton, and Lockhart of Carnwath, *against* Proprietors of the Muir of Biggar, and Others, having servitudes upon the said Muir.

[Elch., No. 2, *Commonty*; Kilk., No. 2, *ibid.*]

This was a question about the division of a commonty, in terms of the statute 1695.

The Lords found, 1*mo*, That, as there were several proprietors here, a division was competent; and the servitude heritors would be obliged to accept of property instead of their servitudes; whereas, if there had been only one proprietor, no division would be competent, and the servitude heritors would not be obliged to that exchange. See *December* 23*d*, *Lieut. Robert Stuart* contra ———. *2do*, That the muir was first to be divided among the joint proprie-

tors; and then the rule was that laid down in the latter part of the Act, *viz.* the valuation of the respective lands or properties of the heritors. *3tio*, After that was done, each proprietor was to divide the share allocated to him, with those servitude men who derived their right from him or his authors; and in that case the rule is that laid down in the middle of the Act, *viz.* the value of the several rights and interests of the persons concerned; that is to say, the Lords were to estimate what the value of the servitude was, and give off a part of the property equal to it. No fourth part was allowed to the proprietor by way of *præcipuum*, but he was to have all that remained, after deducing the value of the servitude.

N.B.—Several of the Lords had a doubt whether a division could be pursued at the instance of any of those having only servitudes.

1739. *June* 19. MR LYON *against* MISS BLAIR.

THE question here was about the construction of the clause of a tailyie; whether, by the eldest daughter or heir-female to be procreate of the marriage, was meant the immediate daughter of the marriage, in whose right Mr Lyon claimed, or the heir at law, *viz.* the daughter of the son of the marriage, Miss Blair.

The Lords found, That the legal meaning of the term heir-female, which in this tailyie is used to explain eldest daughter, is so fixed and appropriated in our law to denote the female heir at law, that nothing less than the express will of the tailyier, declared in so many words, can alter the signification of it: that here there is no such express will: that the words, eldest daughter, seem to have been inserted to establish a right of primogeniture among the daughters: that, in the case of Bargeny, there was a daughter living at the time of making the entail, whom it may be supposed that the tailyier, out of particular love and favour, called to the succession, to the exclusion of his heir at law; but that was not the case here, where all the persons were unborn. Therefore found, *nemine contradicente*, that Miss Blair, the granddaughter of the marriage, and heir at law, was called to the succession.

1739. *June* 19. STRATHORN *against* CUNNINGHAM.

[Kilk., No. 2, *Prescription.*]

I MENTION this case only because an incidental point was determined in it which seemed to be of some consequence; whether the prescription in favour of tenants, introduced by Act 9, Parl. 2, Sess. 1, Chas. II. takes place when the