Session; and to prove the date of the certificate, (which being holograph did not prove its date,) she brought witnesses who deponed they saw it in her possession before the second marriage: yet the Lords found the first marriage not proved. Lord Elchies said that the certificate only created an obligation upon Carrick to marry the pursuer, upon which he could have been pursued for implement; but not a marriage. But *quære*, Is not an obligation to marry actionable; and is not every action of that kind a declarator of the marriage; besides, that the certificate, if it is good for any thing, is an acknowledgment of the marriage being then made, not a promise to marry?

1751. *November* 8. GRAY *against* SMITH.

[Elch. No. 14, *Provision to, &c.*]

IN this cause several questions occurred: 1*mo*, It was debated, Whether, in the case of a man's disponing his estate to his son, and a certain series of heirs without any infeftment following upon it, a proper title could be made up to such a right by a general service to the father, the disponer, and not to the son, the disponee? and the Lords were unanimously of opinion that such service was inept:—And as this was the pursuer's title in this case, they found that before extract he must produce a proper service to the son, the disponee. 2*do*, It was debated, Whether a man having a right to an estate by two different titles, one as heir of the investiture, the other as heir by particular tailyie or disposition, and choosing to make up his titles as heir of the investiture, neglecting the disposition, he can, either by the positive or negative prescription, acquire the fee-simple of the estate to him and his heirs whatsoever, so that the particular tailyie or disposition shall become null and void? And with respect to the negative prescription, the Lords were all of opinion that it could not run except from the time that the succession divided betwixt the heirs of the investiture and the heirs of tailyie; because a man having several titles to an estate may impute his possession to any of them he pleases, and his choosing to complete one of them by infeftment will never be understood as passing from the rest. And in this manner many estates in Scotland are possessed upon sundry different titles, without its being ever understood that any of them could be lost by prescription, while the possessor of the estate had a right to them all; besides, that in such a case as the present, where the tailyie was alterable at pleasure by the heirs of the investiture, there was nobody against whom the prescription could run, because the substitutes in the tailyie were not *valentes agere*, at least *cum effectu*, because they could bring no effectual action to oblige the heirs of the investiture to execute a tailyie which they could alter next day: and here lies the difference betwixt this case and the case of M'Kerston, where the Lords found that the prescription could run. See the case, 5th December 1739. As to the positive prescription the Lords were divided in opinion; Lord Drummore and some others were of opinion that the heir of the investiture might by the positive pre-

scription acquire the estate *tanquam optimum maximum*, so as to make it in every respect a fee-simple to the effect of its continuing in that series of heirs without regard to the provision of the tailyie. This opinion they founded chiefly upon a decision marked by Fountainhall, 31st December 1695, *Innes* against *Innes*, where this was decided *in terminis*; and the like they said was decided in the case of *M'Kerston*. But my Lord Elchies and the majority of the Lords were of opinion that the positive prescription in this case could not take place, because prescription was *adjectio dominii per contumationem possessionis*, which could not be in this case, where the heirs of the investiture had already the property. It is true, they said, if the entail had laid the heirs of the investiture under limitations, that they could not alter the succession, or any other restrictions: then the positive prescription might take place in so far that it would give the property full and absolute without any limitations or restrictions: this was certainly the case of M'Kerston, and, they believed, also the case of Innes against Innes, though not mentioned in the decision. But, with submission, there does not seem to be any foundation for this distinction; for if the possession for forty years in the one case will make a property so absolute that it shall be in the power of the proprietor to dispose of it as he pleases, there is no reason why, in the other case, it should not have a less effect, that of making the estate go in the same series of heirs without any act or deed of the proprietor, and so make the property in both cases absolute and unlimited. The positive prescription, therefore, should either take place in both cases, or, what I think the truer opinion, should take place in neither, and free the possessor from the obligation of the tailyie no more than from any other personal obligation.

3tio, It was debated in this case whether a person who had interdicted himself could alter the succession of his estate; and the Lords seemed generally to be of opinion that he could even without the consent of his interdictors, who were given him not for that purpose, but to direct and advise him in the ordinary administration of his affairs, in the same manner as curators direct a minor in the management of his affairs *inter vivos*, but have nothing to do with his last will; and though a minor be under a legal incapacity to make a deed of settlement of his estate, that is not the case of an interdicted person, who is only so far restrained as the words of the interdiction go.

4to, It was debated in this case, what degrees of facility amounted to fatuity or absolute incapacity to will and dispone; and as this was a question of fact, and depended upon different apprehensions of the import of the proof, the Lords were very much divided in it.

N.B. In this case, as well as in the case of M'Kerston, an estate was evicted from a series of heirs who had possessed for above eighty years upon a deed of settlement that was eighty years old, and had lain latent all that time, and which may have been liable to many nullities, such as deathbed, (which there was great reason to suspect in this case,) or even forgery itself; and if a man cannot be secured against such deeds neither by the negative nor positive prescription, no proprietor of lands is safe, but there is no more to do but to forge a deed of settlement and date it 100 years ago, so that it will be impossible to detect the forgery; and if there are no irritant or resolutive clauses in it, then neither the negative nor positive prescription will operate against it.

LORD ELCHIES said he was as great an enemy as any man to such latent deeds, but he did not think this a latent deed. To obviate such inconvenience, I would propose, that a man having several rights to the same lands in his person, descendible to several heirs, should, by making up titles to only one of the rights, be deemed to repudiate the others, so far as concerns the line of succession, and to will and declare that his succession should be according to the destination of the right which he has completed, in the same manner as if he had expressly revoked all the other destinations. This would remedy the inconvenience, put the thing upon a clear and solid foundation, avoid all intricate questions about prescription, and save to every man all his different titles to lands to be used by him as there is occasion. These principles will apply to the present case, but not to the case of M'Kerston, where the party, being bound up by a strict entail, which he could have been obliged to execute, and could not afterwards alter, had no will in the matter.

It is also to be noticed that the Lords, in this case, were all of opinion that the inferior rights neither were nor could be cut off by the negative prescription, while the person who was in the right of them possessed the estate.

1751. *November* 26. ROBERTSON *against* Ross, &c. Creditors of Easterfearn.

[Elch. No. 5, *Heir-apparent.*]

A FATHER had right to a wadset: the son, after his death, purchased the property or reversion, but neglected to make up titles to the wadset by service to his father; thereafter a creditor adjudged the lands from him, and another creditor after that adjudged upon a charge to enter heir to his father, who, as said, was in right of the wadset; the question was, which of these two creditors was preferable, and whether the last creditor had not an exclusive right on the wadset? Upon this *species facti* the Lords unanimously determined this general point, that where a man has right to the property of an estate, and likewise to other collateral and subordinate rights, commonly called incumbrances, such as a wadset right, (which, though nominally a property, the Lords considered in this case as no other than an heritable bond,) infeftment of annualrent, or adjudication and chooses to make up his titles only to the paramount right, or right of property, neglecting the collateral rights, and leaving them, as in this case, *in hæreditate jacente* of the predecessor, it shall not be in the power of any creditor to rear up these rights so neglected against any other creditor or any other person come in right of the debtor. It was said by some of the Lords that a man in such circumstances had potentially in him all the other rights, though he only chose to complete his right to the property, (for so they considered the reversion in this case,) which being the nobler right swallowed up the rest. Others, and particularly Elchies, insisted upon the great inconveniences that might arise if such inferior rights might be reared up and made separate estates of, considering it is a very common practice for men to purchase in incumbrances in order to secure their estates, and then to let them lie in their charter-chests without ever thinking of making up titles to them. But this is an argument only from expediency