1666, and 1667. CRANSTON *against* WILKIESON.

1666. *January* 1.—IN this case, they found intromission had by a cedent with the goods and gear of the common debtor, long before any assignation, relevant to be proven *prout de jure,* and to take away a debt constituted by writ; on this ground, that the cedent by his universal intromission did represent the debtor, and so *confusione tollebatur obligatio.*

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 55.

1666. *July* 12.—In the said above written case, found, That where an heir being pursued by a creditor to pay a sum awarded by his predecessor, he could not object vitious intromission against the creditor, pursuer, *ad hoc* to extinguish his debt. But in case the pursuer did vitiously intromit, the Lords found him liable *pro tanto;* unless he had been convened as vitious intromitter, by way of action, before he pursued the heir for the debt.

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 56.

1667. *June* 29.—In the foresaid action betwixt Cranston and Wilkieson, found that Wilkieson being bound by contract of marriage betwixt him and Barbara Home, to infeft himself and his wife, the longest liver of them two, in conjunct fee or liferent, and the heirs gotten betwixt them in fee, which failyieing to the wife's heirs and assignees whatsomever; my Lord Stair, who only heard the cause, found that Cranstoun, who was the wife's heir, had no right to the tailyied lands, as heir to his mother, but that he behoved to be served heir of provision to Alexander Wilkieson the first tailyier. His reason was, because, if there had been bairns gotten of the marriage, the bairns behoved to be served heir to the father, and not to the mother, notwithstanding of the termination of the fee on the wife's heirs: so that during the non-existence of bairns of the marriage, the fee could not be pendulous, and hang in the air, but it behoved to inhere in some subject, either in the father or the mother. In the mother it could not; because if she had had a child to Wilkieson, he behoved to serve himself heir to his father, and not to his mother, and so he behoved to be fiar: and consequently Barbara Home's heir ought to be served heir of provision to him, and not to his mother; since the marriage betwixt the man and the wife dissolved without heirs or bairns. And so the case being a reduction at Wilkieson's heir of conquest his instance against Cranston, the wife's heir, my Lord Stair found he had no interest to reduce Cranston's right, as heir of conquest to Wilkieson; because he was but naked liferenter of that land, he dying without heirs of his own body: but withal found Cranston's right and infeftment, as heir to his mother, could not give him an interest to the land; but he behoved to be served heir of provision, as said is.

This decision of Stair I do not well understand; for Craig, in his diegesis *De conjunctis investituris,* says clearly, that in the conception of a tailyie in the terms foresaid, the wife is fiar, because of the termination. And when I alleged this to my Lord Stair, he said the Lords had decided contrary to Craig in several cases sincesyne; especially in a tailyie made by Sir Ja. Scott in favours of Sir Jo. Brown and Lady Rossie, where they found, though there was a child got betwixt them, yet that the Lady was fiar, and not Sir John, her father, who was but liferenter.

Now I see no material difference betwixt our case and that of Sir Jo. Brown's daughter. And how thir decisions stand, I apprehend not: for I put no doubt but Barbara Home, after her husband's decease without any heirs, might have sold it in her own lifetime; and if her son behoved to be served heir of provision to his stepfather, Wilkieson, then a creditor might have comprised it from Wilkieson; which would frustrate the tailyie.

In this same case, there was another question that arose from the conception of this infeftment, which was the termination on Barbara Home's heirs, and not on Barbara herself; which I conceived induced my Lord Stair to that decision; but really he might have given the Lords' answer on the conception of the infeftment, his opinion being contrary to Craig's, and seemingly contrary to the Lords' decisions in a case not unlike unto this. In this same contract, as this tenement was tailyied to the wife and her heirs, so by a clause subsequent, all lands, heritages, &c. to be conquest during the marriage were siclike provided: which, because there followed no infeftment on it, the Lords found furnished him only an action; and that the copulative particle, " and siclike," subjoined to the clause of tailyie immediately preceding, subjected that clause of the conquest to that same sense and interpretation.

The subject of tailyies I intend, God willing, to handle apart, for my own satisfaction.

Act. Birnie. *Alt.* Dinmuire. Mr. Alexander Gibson, *Clerk.*

Advocates' MS. folio 58.

1670. *January* 1. CRANSTON *against* SOMERVELL.

A decreet of removing being obtained by Thomas Cranston against Wilkieson, and being suspended on obedience, there was compearance made by one who was infeft long before, and whose right had been preferred in an action of maills and duties; and so contended, that as he was preferred in the maills and duties, so he had good interest to allege, in this suspension, why he ought not to suffer that tenant to remove, to the effect Cranston might get possession of the land, both being *in acquirenda possessione.*

The Lords found, notwithstanding of the diligence used by Cranston, who had used an order of warning against this tenant, and that the other had neglected it, yet that he ought to be admitted to debate upon his right with Cranston, so far as might be done in a possessory judgment. And because the seasine produced by Somervell, the other party, did not meet; therefore they preferred Cranston to the possession.

Act. Dinmuire. *Alt.* Birnie. *Advocates' MS. folio* 61.