Farther ALLEGED for Alexander and Patrick Cockburnes, who have a right of wadset in the said lands,—That they cannot be liable but since the years of their possession, which began in July 1653; because the foresaid teind or valued duty is not *debitum fundi*, but the possessors are only liable for the same.

Which allegeances the Lords found relevant; and therefore found the said Alexander and Patrick Cockburnes only liable for the foresaid valued teind duty, and silver duty, the crop and year of God 1653, and since syne.

Advocates' MS. folio 61.

1668. *July* 24. ALEXANDER RITCHIE *against* GEORGE WAUCHOP of Gleghornie.

ALEX. RITCHIE, son, and heir served and retoured, to umquhile Mr. James Ritchie, his father, pursues for poinding of the ground of the lands of Cleghornie, upon an heritable bond, containing the sum of 12,000 merks, and infeftment taken thereupon.

Against which, it was ALLEGED,—That no process ought to be granted upon the heritable bond, till the pursuer deliver and procure to the defender a disposition from Doctor Jo. Levingstone to the teinds of Gleghornie, conform to a minute of contract past betwixt the pursuer's father and the defender, and which was partly the onerous cause for which the said bond and infeftment was granted.

ANSWERED and REPLIED,—The foresaid allegeance was not relevant *hoc loco*, but the defender must pursue the minor and his tutors; who cannot be holden to fulfill that part of the foresaid minute, anent the said teinds of Cleghornie, until decreet be recovered against them therefore: especially considering that the price allowed for the said teinds is a very small part of this principal sum of 12,000 merks, specified in this heritable bond, and which haill sum lies in the defender's hands; and therefore he cannot, upon that pretence, stop now the pursuer, who only craves poinding of the ground for his annualrents.

The Lords repelled the allegeance, in respect of the answer and reply made thereto, and therefore decerned.

Vide *infra, Jan.* 1676, No. 456; [thir same parties.]

Advocates' MS. folio 62.

1669. *February* 11. JANET SHAW *against* MARGARET CALDERWOOD, relict of George Shaw.

IN the action of reduction, pursued by Janet Shaw, heir served and retoured to Charles Shaw, who was son and heir served and retoured to umquhile George Shaw, against Margaret Calderwood, relict of the said George Shaw, to exhibit a disposition of the liferent of certain tenements of lands lying in Leith Wynd, made to her by the said George, to be reduced, 1*mo*, because all dispositions made by persons on death-bed, and after they have contracted a mortal disease, and whereof they never recovered but die, in favours of any, in prejudice of the immediate

heir or heirs by progress, are reduceable at the instance of the said heir or heirs; and if the said immediate heir be minor the time of his decease, and has not in his lifetime reduced the said disposition, the benefit of the said action of reduction is likewise competent to the heir of the said deceased heir. But so it is, the disposition made by umquhile George Shaw to this defender was such, viz. *in lecto*, in so far as he never came out after the subscribing of it, but had contracted the disease of before; and though it bear to be dated on the 1st December 1663, yet it was only subscribed in April 1664: and this disposition, as it was in prejudice of Charles Shaw, heir to the disponer, so it is to the detriment of this pursuer, who is infeft as heir to the said Charles, and consequently as heir by progress to George the granter; and which Charles having died before his majority, she must have the benefit of this reduction. *2do*, The decreet of registration of the said disposition obtained by the said defender must also fall, in consequence, with the said disposition.

It was first ALLEGED they could not debate on the reasons, because the production was not fully satisfied; in so far as the charter craved to be produced was not produced.

REPLIED, There was no necessity for producing the charter, seeing they declared they held the production as satisfied by the disposition and decreet of registration produced; and protested, if the said disposition should be reduced, that the charter proceeding thereon might fall in consequence.

The defender's procurators protested in the contrary. Then ALLEGED, The pursuer has no ground nor interest to quarrel this disposition, because she is not *hæres* immediate apparent to the granter; there having been two of the disponer's sons living then: and they having thereafter *ex post facto* deceased, she cannot upon this supervenient right quarrel the said disposition now.

(*Vide infra*, Number 369, in *July* 1672, *Gray and Scott* contra *Gray*; where the like case is.)

REPLIED, Though she was not *hæres* immediate, yet she was mediate heir; and there is *par ratio* for the one as well as the other to quarrel their predecessor's deeds; especially where the immediate heir dies minor, and the pursuer is now come in his place and has good interest.

Then further ALLEGED, always adhering to their former allegeance, That the said disposition could not be reduced, because the granter went to kirk and market after the same. *2do, Esto* It were *in lecto*, yet it was sufficient as to this defender, in order to her provision of liferent: and the yearly rent disponed being so very inconsiderable, only 200 merks a-year, and she being no otherwise provided by her husband, as he might any time of before, so also even in death-bed, have granted it; and in no sense or law ought it to be quarrelled, she being no otherwise provided. *

REPLIED for the 1st,—It is offered to be proven, *per testes instrumentarios*, that it was not subscribed till April 1664, and therefore they are forced to allege kirk and market since that time, and not since the time of its supposed date in December, 1663: and they offer to improve the same *in data*, and consign, if the defender will abide at it. As to the 2d, though the husband might in his *liege poustie*

* Craig thinks a man may give his wife a jointure *in lecto*, because it is no *perpetua alienatio*, page 85; but Durie observes the contrary found by the Lords at the 1*st of February*, 1622, *Robertson*.

have burdened his heir, or disponed and provided any part of his estate, in favours of his wife for her liferent use, yet it not being done *debito modo et tempore*, it ought not to be respected.

The Lords found the mediate heir had interest; and sustained the antedating relevant to be proven. And witnesses having been adduced thereon, and the same advised, the Lords found the same false in the date.

Then the pursuer's procurators ALLEGED, The same being false in the date, was false in all, and therefore craved it be wholly reduced. The Lords declared they would hear both parties' procurators thereon.

Then the pursuer produced two practicques out of Dury, the one on the 29*th of March*, 1626, between *Keith* and *Robertson*, and the other at the 10*th of February*, 1636, between *Edmiston* and *Syme*. Likeas the defender's procurators contended, It ought not to be null *in totum;* and produced a practicque out of the same Dury at the 4*th December*, *Winraham* contra the *relict of Mr. Robert Winrahame*. See them all in Dury.

The Lords having considered them, FOUND the disposition false in the date, and therefore reduce and improve *in totum* the said disposition; and repone and restore the pursuer *in integrum* against the same, as if it had never been *in rerum natura:* reserving always to the said defender any right of terce, or other right she may have to the said lands, *prout de jure.*

Sinclar and Lermonth were for the pursuers, and Lockhart for the defender.

Vide infra, Number 375, in *November* 1672, between *George Home* and one *Brown.*

Vide infra, November, 1673, *Oliphant* and *Lady Grange*, Number 431.

It may be questioned What, if they had offered to prove that even after the true date that ought to have been inserted, he went to kirk and market, and so by the change of the date the pursuers had no prejudice; seeing it would have debarred them from quarrelling it, though it had been of that one date which they contend for? They say the Lords found such a falsehood so punishable, that the writ should make no faith at all, though there were no other ground whereby the same could lawfully be impugned. And this seems just. See *Craig de Feudis*, page 156. *Advocates' MS. folio* 62.

1669. *January* 20, and *February* 9. The BISHOP of GALLOWAY, the BAILIE of ARRAN, the DUKE of HAMILTON, and his Donatar, *against* DAVID FRENCH, and the TENANTS of MILNEBURNE.

January 20.—In this case, it came to be debated, if a charge given to the superior to enter a vassal who had comprised, did prejudge him of his casualties of ward and non-entries, which befell him thereafter, by the vassal's decease from whom the lands were comprised. The Lords, in P. D. found such a charge not equivalent to an infeftment, which denudes the prior vassal, and stops ward; and that the superior thereby is not prejudged of these casualties; which was never