1697. *July* 13. The MARQUIS of TWEEDDALE *against* CAPTAIN DURY of CRAIGLUSCAR.

THE Marquis of Tweeddale pursues Captain Dury of Craigluscar, (who held his lands and teinds of the Lordship of Dunfermling,) for payment of the feu and teind duties of his lands for many years bygone, both in his father's and his own time. During his own possession he did not reclaim; but, *quoad* the years in his predecessor's time, he (denying the passive titles,) offered to prove payment. The Act being thus extracted, the Marquis contended he was exonered from proving the passive titles, because the defender had proposed a peremptory exception of payment.

ANSWERED,—His confessing or denying the passive titles could import nothing *quoad* the feu duties; because, being *debitum fundi*, he was liable however; but the proponing it *quoad* the teind, must be interpreted *habili modo* only of the years of his own possession, so as it may consist with his denying the passive titles: And there could be no more meant by his allegeance of payment; and, where a thing is dubious, it were a strange inversion of law to detort it to make me universally and *passivè* liable; seeing *gestio pro hærede* requires a clear intention of the apparent heir, signified by some ouvert act, *se velle adire hæreditatem, l.* 20. *D. de Acquir. et Omit. Hæredit.* And, with us, every declaration will not infer a passive title; such as the designing himself heir, at least apparent heir, in a writ,---Dury, 24*th January* 1627, *Glenkindy* against *Crawfurd;* 8*th July* 1628, *Dunbar* against *Lesly;* nor yet the having the evidents, nor the paying of some debts: Neither does the probation in a decreet upon the passive titles prove *extra illum processum*, in another process,---*Dury*, 20*th November* 1629; 20*th July* 1626, *Harvey* against *Baron:* and, 21*st January* 1675, *Telfer* against *Corsan*, the proponing payment was not found a passive title, but only to exeme the pursuer from proving that point and article of the libel for which payment was proponed.

The Lords found Craigluscar's advocate's unwary proponing of payment indefinitely, without distinguishing whether for the years of his own or his father's possession, could not infer an acknowledgment of the passive titles, which, in another part of the act, he expressly denied. *Vol. I. Page* 784.

1696. *July* 15. THOMAS BURNET of KEMNAY *against* The DAUGHTERS of SIR ALEXANDER BURNET of CRAIGMILNE.

HALCRAIG reported Mr Thomas Burnet of Kemnay against the Daughters of the deceased Sir Alexander Burnet of Craigmilne, for exhibition of all tailyies to the heirs-male, to the effect that he, as being the apparent heir-male, may deliberate whether he will enter. The defence was,—We will not exhibit to you; because, by a revocation under the defunct's hands, he recalled and annulled all such tailyies upon disobligations received; and, if he founded upon any tailyie subsequent to that revocation, they are willing to depone thereanent.

ANSWERED,—The revocation may be a good defence against delivery, but not against exhibition; for there may be mutual tailyies, or bearing clauses dispens-

ing with the non-delivery, or renouncing all power to alter; in which cases they would not fall under this revocation; and the parties must not be made judges of the nature of tailyies, or the import and meaning of clauses, else an apparent heir may be cut out of all inspection *ad deliberandum.*

The Lords, on the one hand, thought it unreasonable to expose charter-chests to view, where such a document as a revocation indicated the alteration of the tailyier's mind; and, on the other hand, it was as dangerous to let parties judge on dubious and ambiguous clauses: therefore they took a middle way, ordaining the defenders to produce all tailyies lying beside the defunct, upon oath, and the Reporter to peruse the same; and, if he finds they do not fall under the revocation, or may be debateable, then he is to allow the pursuer inspection thereof, and to hear them how far the same are revoked.

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1697. *July* 15. CHRISTIAN SALTON *against* ANDREW CRAWFURD.

HALCRAIG reported Christian Salton, in Lithgow, against Andrew Crawfurd, to denude of the right of an assignation of a 500 merk bond made to him, that he might include it in an adjudication he was leading against the common debtor's lands for sums owing to himself.

ALLEGED,—The fee of this sum belongs to your brother Harry, who is abroad, and from whom you have no right; and though you be liferenter, yet you have no interest, either to lift the sum, or to crave me to denude of the trust, but only to claim the annualrent during your lifetime.

ANSWERED,—A liferentrix is always allowed the *jus exigendi* of the debt, upon finding caution to make it forthcoming to the fiar when the liferent expires; as appears *per L. L.* 3. *et* 5. *sec.* 1. *D. de Usufruct. ear. rer. quæ usu consum.* And, on the 15th of February 1684, between Sir Robert Milne and the Lord Harcourse, about Ludquharn's estate, the Lords found the relict had not only right to uplift, but that an apprising led by her for the stock subsisted as a valid right, even against a singular successor. And the defender's design here is only to retain the money in his hand on the pretence the fiar is still alive, *et præsumitur vivere usque ad centum annos,* being abroad, and unknown whether alive or dead; therefore she, as *curator bonis data,* is willing to find caution.

REPLIED,—Liferenters have never the power of uplifting but where the debtor is *vergens ad inopiam*; but here he is abundantly responsal and solvent, and so there is no necessity of recurring to that extraordinary remedy.

The Lords found he ought either to denude or pay; the pursuer finding caution to secure it for the fiar's use, and to reëmploy it in these terms, at the sight of the Lord Reporter.

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1697. *July* 16. MAXWELL of MUNSCHES *against* MAXWELL of BARNBACHEL.

PHILIPHAUGH reported Maxwell of Munsches against Maxwell of Barnbachel. It was a reduction of a decreet on this nullity,—that I am decerned, on the pas-