spouse, and the longest liver of them two, in liferent, and to the bairns procreated of the said marriage; whilk failing, to the said Elizabeth and her children of any subsequent marriage; whilk all failing, then to William Macguffock her father, his heirs and assignees whatsomever. William Macculloch being the only child of this marriage, and both his father and mother being dead, he serves himself heir in general to his father, and charges for the 9000 merks. Rusco suspends, on this reason, That there was no sufficient title in the charger's person to the sum; for, by the conception of the clause of tailyie, the wife was fiar: so that a service as heir to his father, who was only liferenter, cannot establish the right in his person; but he must be likewise served and retoured to the mother.

ANSWERED,—Although the last termination centred in the mother's father and his heirs, that was only conditional, in case there had been no heirs of the marriage; but, *ita est*, he being the only child, he cannot be heir in this sum to his mother, but only to his father. And even where the fee terminates in the wife's heirs, yet the Lords always find, by their tract of decisions, that the husband is fiar, both as the *dignior persona*, and that the sum is provided to the husband's heirs, in the first place, and only to the wife's heirs failing of them, and who only come in as heirs of provision to the husband; as was decided, *12th July* 1671, *Gairns* against *Sandilands and Burn*. See Dury, *29th January* 1639, *Graham* against *Park*; as also Stair, *14th January* 1663, *Begg* against *Nicolson*; and in his Institutes, *lib. 3. tit. 5. sec. 51*; and Dirleton, *voce Substitution in Bonds*; where he is positive that the husband in thir cases is fiar.

Some of the Lords thought it safer that he should likewise serve heir to his mother: but the plurality found it incongruous and unnecessary; and therefore sustained his title as heir to his father, to carry the right of this money.

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1704. *July 23.* COLONEL STEWART of SORBIE *against* WILLIAM AGNEW of CASTLEWIGG.

COLONEL Stewart of Sorbie, brother to the Earl of Galloway, pursues William Agnew of Castlewigg, for the multures of his lands, on this ground:—That, by a bond, his predecessors had thirled his lands to his mill, and obliged himself to pay the thirteenth corn for all oats growing on the said lands, seed and horse corn excepted.

ALLEGED,—Multure is due for service of grinding; but I have no grindable corn growing on my lands, because I have parked it, and turned it into grass; and, by the Act of Parliament 1661, in favour of inclosed grounds, all such lands are declared exempt and free from all manner of burdens; and when he thinks fit to till his land again, he will be liable for the multure, but not till then.

ANSWERED,—The bond bears to have been given for onerous causes, and obliges him to abide thereat, renouncing all exceptions; so no voluntary deed of his can evacuate the thirlage, and render it altogether elusory; and he cannot so change the nature of the ground as to frustrate it totally. Law encourages improvements, but not to the prejudice of others; and, if your land-rent be thereby bettered, you may the more freely pay a consideration for your mul-

tures; and the Acts of Parliament exeme from cess for a time, but never meant such private transactions as a bond of thirlage: and, by casting their lands into grass, they might as well plead to be free of parsonage-teinds, because they have no arable ground bearing corn.

The Lords saw inconveniencies on either hand. Every heritor ought to have the free disposal of his own property for his own advantage; and yet you ought not to use it so as to deprive me of that which is reputed a fixed rent, and uses to be bought and sold. For clearing the case, and fixing marches, the Lords declared they would hear the cause in their own presence. A partial abatement of multure would be less regarded, where one converts a part of his ground from arable to pasturage, for his own advantage, and not *in æmulationem vicini vel domini superioris*; but a total extinction deserves a farther inspection.

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1704. *June 27.* SIR JOHN MALCOLM of INNERTEIL *against* The EARL of ROSEBERIE and the OFFICERS of STATE.

THE deceased John Malcolm of Balbedy, father to the said Sir John, had the gift of the chamberlainry of Fife from King Charles I. in 1644, and got it thereafter renewed by Charles II. in 1664 to himself, and, after his decease, to the said Sir John his son. Balbedy having refused the test in 1681, the said office was conferred on Mr George Bannerman; and he dying after the Revolution, King William gifted it to Sir John Dempster of Pitliver; and, on his death, Queen Anne gave it to the Earl of Roseberie *durante beneplacito*. Sir John Malcolm, having qualified himself by taking the oaths to Queen Anne, raises a declarator against the Earl of Roseberie and the officers of state, to hear and see it found and declared, that he has the only good and undoubted right to the said place, and ought to be put in possession thereof, being now qualified according to law.

ALLEGED for Roseberie,---That Sir John had lost and amitted the said office by his father and his own not taking the test, and, since the Revolution, by not taking the oath of allegiance to King William, conform to the appointment and limited time of the 6th Act of Parliament 1693, declaring all persons not taking the said oath should, *ipso facto*, lose their offices; and accordingly the same was filled on the vacancy, by putting in the persons above named into the same.

ANSWERED,---His father's omission to take the test could not prejudge his reversion and survivancy, seeing he could not regularly enter during his father's lifetime; and he survived the Revolution several years, during which time he could not have access to the exercise of that office. Neither is it any objection or obstruction, that he did not qualify himself sooner, because he, having the gift during life, might claim it, or make use of it when he pleased; even as a tutor of law may enter when he will, and remove a tutor-dative from the office. And the Act of Parliament 1693 speaks only of them who were actually in office, or should thereafter enter to the exercise thereof, that they be deprived if they officiate before they take the oath; which is not his case: for he had only a reversion, survivancy, and claim, and did not attempt to exerce till he had first quali-