

or's hands. ANSWERED,—Either it was actually intromitted with by him, or he ought to have done diligence for recovering thereof.

The Lords found it relevant, that the sums assigned were uplifted and intromitted with by the defender or his father, to make him personally liable for this debt ; and, failing thereof, found that Paton must assign Anderson to 2500 merks of these sums, with this special warrandice, that they are yet resting owing, unuplifted ; on which assignation ordain Anderson to discharge his claim : and, to discover what is intromitted with, and what not, ordained Paton to produce his father and brother's count-books. And the term being circumduced against him for not obtempering the interlocutor, he gave in a petition, showing he had produced these count-books in another process, betwixt Sir Samuel Maclellan and him, and they were borrowed up ; so he could not exhibit them without a special warrant.

The Lords stopped the circumduction, and ordered the reproduction of them in the clerk's hands.

Another question was started in this cause, *viz.* what kind of debts he should be assigned to : If he could crave the most sufficient and responsal of the whole list, or if they could offer him the refuse and desperate debts. It was thought neither of them were to be gratified in such an election, but, without picking, he ought to have a share of both. Which is agreeable to the common law, as Vinnius observes, *sect. 22 et 23, Institut. de Legat. Vol. II. Page 532.*

1709. December 6. DAME MARGARET LAUDER, Lady Pitmedden, against SIR ALEXANDER WEDDERBURN of BLACKNESS.

The lady, as executor to Mr William Lauder her father, having right to the fee of 4000 merks due by the town of Dundee, the liferent whereof belonged to Eupham Bathgate, relict of Mr Robert Lauder her uncle ; and £861 of it coming into the hands of Blackness, and arrested there, my Lady and her husband obtain a decret of forthcoming against him; decerning him to pay the money to them as fiars ; Eupham the liferentrix always renouncing her liferent in so far as concerned Blackness's obligation to pay her, upon my Lord Pitmedden's giving her sufficient security to make punctual payment to her of the annualrent thereof, during her lifetime, at two terms of the year, at her own lodging at Dundee. The relict being required to renounce on a new security, which seemed unquestionably good, that was offered her, she refused on this reason, That she could not be obliged in law to quit the security she had already for any equivalent in place of it, Blackness and she living in one town, and making payment to her in her own house ; whereas she behoved, in the other case, either to send to Edinburgh, or to have one there to receive it, which would be a great inconvenience to her ; whereas law had provided remedies in the case of payment, at a special particular place,—*tit. dig. De eo quod certo loco ; and sect. 31, Instit. de Act.*

ANSWERED for the Lady Pitmedden,—Whether the relict, liferentrix, consents or not, she, as fiar of the sum, has the *jus exigendi* and right to uplift the debt, on securing her interest, which was offered to be done by caution beyond exception, and she was no farther concerned. And the 226th Act 1594 allows

fiars to repair liferented tenements, on their finding caution to secure the liferenter who had suffered the tenement to go to ruin or decay. And the Lords have found, where a fiar of a house within burgh inclined to dwell in it himself, the liferentrix must cede the possession, on his finding sufficient caution to pay her the rent it then gave.

REPLIED,—That only held where the debtor, in the liferented sum, was *vergens ad inopiam*; for then it was the benefit and concern of both fiar and liferenter, that the sum should be preserved; but here the debtor Blackness's solvency was not questioned.

The Lords, by a scrimp plurality, found the lady, as fiar, might uplift the sum, on caution to pay the liferentrix the annualrent thereof termly; but it behoved to be burgh caution within the town of Dundee, that her present security may not be any way diminished or deteriorated. And their offer to pay her at Dundee was not enough, unless she had a dwelling there to exact it from.

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1709. December 8. CUNNINGHAM of CRAIGENDS against The EARL of EGLINGTON.

CUNNINGHAM and the Earl of Eglington. Cunningham of Craigends, being heritor of the village of Kilbarchan in Renfrewshire, obtains a charter from the Queen, in 1704, to himself in liferent and his son in fee, containing a *novodamus*, and the right and privilege of keeping a yearly fair on the 4th of December, and uplifting the customs and duties of the same; whereupon, being infest, he raises a declarator against the Earl of Eglington, heritable sheriff of Renfrew, pretending right to the same duties, and craves it may be declared that he has the sole and only right of holding the said fair, and uplifting the duties payable for weighing the goods, and furnishing other accommodations to the merchants resorting thither.

Against which declarator it was ALLEGED for my Lord Eglington,—That he stood infest in the heritable sheriffship of Renfrew *cum omnibus feodis, divoriis, et privilegiis eidem pertinentibus*; and, by virtue thereof, he and his authors were in the immemorial possession of uplifting a small duty for the weights at that fair, long before Craigends' charter giving him right thereto. And he being the sovereign's lieutenant in that place, *et publicus justitiæ vindex*, what could hinder him to take a moderate duty for his pains in overseeing the weights, that the neighbours, in buying and selling, should not overreach one another; and this possession has been sustained to give a right to the Lord Halton, come in place of the *Scrimgeours, Constables of Dundee*, against the *Town of Dundee*, 9th December, 1679; and in the *Earl of Kinghorn's* case, against the *Town of Forfar*, 18th July 1676; and again, *Farquharson* against the *Earl of Aboyne*, 2d December, 1679. 2do, You can never quarrel my right; for your father took a tack of thir customs from me, in the 1677, during his life, for payment of ten merks per annum, and so, you having homologated and acknowledged my right, that excludes you, *exceptione personali*, to come against your own deed.

ANSWERED for Craigends,—That were a slavery indeed, if sheriffs should exact customs within my burghs of barony and property; and it is plain law, that