the half,—I have right by my contract, bearing my acceptation of the jointure in full of all, except a half of the household-plenishing, to which it is declared she shall have right. The Lords thought this clause would not debar creditors, if they were *in campo*, from affecting that half; and therefore ordained her to find caution to relieve the executor at her first husband's creditors' hands, if he happen to be distressed, to be liable proportionally with the rest of the moveable estate, as accords of the law; reserving her defences in any such process when it shall be intented: For, when the parties design that the relict should have a share in the moveables, not subject to the husband's debt, it is, by an express clause in the contract, provided to be free; and, however this may be quarrelled by the creditors, as in defraud, (unless they be disponed *per verba de præsenti*,) yet it will always operate so much as to force the husband's representatives to make it up to her. *Vol. I. Page* 719.

1696. *June* 12. SINCLAIR of FRESWICK and WILLIAM MAXWELL *against* MR JOHN MOWAT.

THERE being a petition given in by Sinclair of Freswick, and William Maxwell, macer, against Mr John Mowat, advocate, the Lords demurred on this point,—Where a comprising is disponed with warrandice against the disponer's and his author's facts and deeds, excepting the deeds of two persons named, whom they supposed to be the party they heard had granted some writ thereanent, but now, after trial, it is found to have been done by another; whether the exception ought not, in justice and equity, to be extended also to this contravention, though not mentioned, seeing it has been so meaned amongst the parties, that at least some deed should be excepted from the warrandice; and these, by mistake condescended on in the right to the apprising, having done nothing, it must be presumed that this was what the parties designed. But, if any deed against the warrandice can be instanced in those named in the disposition and conveyance, then this presumption ceases. Next, it was argued,—This distress extended no farther than to the purging the acquirer's damage and true interest, and refunding the sum they paid for the comprising, and not to the whole extent of the sums disponed and therein contained; for which was cited, *l.* 13, *D. de Evict. l.* 18, *et* 24, *C. eod. tit.;* and Stair, 26*th January* 1669, *Boyl* against *Wilkie*.

The Lords remitted thir points to be farther heard by the Ordinary.

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1696. *June* 12. MARGARET FRASER and RORY MACKENZIE of PRESTONHALL *against* LORD LOVAT.

WHITELAW reported Mrs Margaret Fraser, relict of Major Munro, and Mr Rory Mackenzie of Prestonhall, her uncle, against the Lord Lovat, her brother,

for payment of £8000, as her portion. ALLEGED,—That the bond of tailyie, wherein this provision is contained, bears no personal obligement on him to pay, but only in case he redeem the estate from his sister; but, *ita est*, he does not bruik by that title, nor has yet used any order of redemption; and, till he use it, he cannot be liable. ANSWERED,—He must then condescend *quo titulo* he possesses. REPLIED,—As apparent heir to his grandfather. DUPLIED,—He cannot pass by his father, granter of the disposition of tailyie, because he stood expressly infeft.

The Lords found the duply relevant, and repelled the defence; and found him liable,—the pursuer proving that Hugh, Lord Lovat, the maker of the tailyie, was infeft. *Vol. I. Page* 720.

1696. *June* 17. DAVID KAY *against* RICHARD HOWISON.

ON a bill given in by David Kay, against Richard Howison, brewer in the Potterrow, representing, That, being incarcerated for £36, he was starving, and therefore the pursuer should either liberate or aliment him;—the Lords found, The only case where they obliged creditors to aliment was where they opposed the debtor's coming out on a *cessio bonorum*. But here there was none raised; yet, the sum being small, they recommended to two of their number to treat with the creditor to give an ease, and to pay what should be agreed on furth of the funds of the poors' money for relieving prisoners for small debts.

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1696. *June* 18. PURVES *against* MILLER and CRAWFORD.

MERSINGTON reported Purves against Miller and Crawford, feuars in Dunse, being a suspension of a decreet of the baron-court of Dunse fining them in £100 for the riotous throwing down of a dyke Purves had built on his own ground. ANSWERED,—The decreet was null, being pronounced in vacance without a dispensation, and the fine beyond the baron-bailie's jurisdiction; and, as to the fact, it was warrantable, seeing thereby you closed up a door which, past memory of man, was a common passage to the crofts adjoining. REPLIED,—While the whole tenement of houses was in one heritor's hand it was then a passage; but coming now, by a contract of division, to be possessed by two, this door falls all to be within Purves's share and proportion. REPLIED,—Though it were, it must be always with the burden of a servitude of passage to me for the conveniency of my land.

The Lords assoilyied from the fine, in respect the point of right was yet dubious; but turned the decreet to a libel, and allowed the Ordinary to hear them, who had best right to this door, or if it was common to them both.

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