

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 exonerated 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 allegiance 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 overt 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, 24th January 1627, *Glenkindy* against *Crawfurd*; 8th July 1628, *Dunbar* against *Lesly*; nor yet the having the evidents, nor the paying of some debts: Neither does the probation in a decret upon the passive titles prove *extra illum processum*, in another process,—Dury, 20th November 1629; 20th July 1626, *Harvey* against *Baron*: and, 21st 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.

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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-