

**No 26.** THE LORDS found the clause to carry the stock of the money, and preferred Dorathy. And it being thereafter offered to be proved, that by the custom of England, such clauses signify only the liferent use, the LORDS repelled the allegiance, in respect of the clause, being provided to Dorathy's heirs and assignees, and in respect of the clearing the meaning thereof by the testament would not delay the process upon the proving the custom of England, the matter being clear in contrary.

*Stair, v. I. p. 117.*

1680. June 30.

JORDAN *against* HOMES.

**No 27.**

WHERE a sum is taken payable to a woman in liferent and her son in fee, the LORDS found the money payable to the liferentrix, but that she could not lift it without citing of the fiar to see it re-employed, or caution found; but granted a diligence to cite him in that same process; and found it not enough that the grandfather offered to consent to the uplifting of it by her.

*Fol. Dic. v. I. p. 549. Fountainhall, MS.*

1702. December 17.

OGILVY *against* STORMONTS.

**No 28.**

An heritable debt being payable to one in liferent, and another in fee, the Lords found a requisition null, because used only at the instance of the liferenter, and not of the fiar, although, by the clause of requisition in the bond, the liferenter had power to uplift and re-employ for his liferent use.

OGILVY of Ascreavy grants an heritable bond for 2000 merks to James Stormont in liferent, and Thomas his son in fee, containing a clause of reversion on premonition of 60 days, and also a clause in favour of the annualrenters, empowering them to use requisition in the same manner, and thereupon they are infest. Ascreavy in August 1700, uses an order of redemption against them, and premonishes them to receive their money on Martinmas thereafter; and in respect of their absence, consigns it, and pursues a declarator, and obtains a decret of redemption in July 1701. Stormonts, on this, do likewise use a requisition and charge for their money, and suspend his decret of declarator; which brings in the whole affair. *Objected* by Stormonts, That Ascreavy's premonition was illegal, it being only made to the son, and not to the father, liferenter, though the clause of reversion bears, that both ought to be premonished. *2do*, The attendance and consignation was on the day after Martinmas, and so is disconform to its warrant, which bears Martinmas day. *3tio*, His instrument bears, that he only attended betwixt ten and twelve, whereas the clause is between sun-rising and sun-setting. *4to*, The decret of declarator is stolen forth in absence, and not put up in the minute-book. *Answered* to the *1st*, It was personally intimated to the son, and he required to advertise and premonish his father, which was sufficient. To the *2d*, Martinmas that year falling on a Sunday, he could not use the order and consignation that day, but did it the

next lawful day, being Monday. To the 3<sup>d</sup>, It is offered to be proven, the annualrenters came no part of that day, and so he needed not attend the whole day. To the 4<sup>th</sup>, You being lawfully cited, and contumaciously absent, the decret must bind you aye till you refund his expenses, and it can yet be put up in the minute-book. THE LORDS found the premonition and decret of declarator both null and disconform to the clause of reversion in the bond; and that where the term falls on a Sunday, the order and consignation should rather be the day before than the day after. Then it was *objected* against the annualrenters their requisition, that it was also null, being used only at the instance of the liferenter, and not of the fiar, and is not fully attested by the notary. *Answered*, The liferenter has power to uplift and re-employ for his liferent use. But the LORDS found it likewise informal, and therefore assoilzied both parties from being liable to penalties, termly failzies, or expenses to one another; but would not burden the annualrenters to uplift it from the consignator, but found the letters orderly proceeded against Ascreavy for principal and annalrent, and no more, aye and while he paid the same; for the consignation being illegal, he ought to be at the trouble of lifting it. See REDEMPTION.

*Fol. Dic. v. 1. p. 549. Fountainhall, v. 2. p. 167.*

1711. November 7. M'INTOSH against RATTRAY.

THE Lord Polton probationer (in the room of Lord Anstruther deceased) reported M'Intosh and Rattray. David Rattray grants to M'Intosh a bond for L. 100, payable to him and his wife in liferent, and failing of them by decease, to return to the said David himself. M'Intosh, the creditor, charges him for payment of the principal sum. Rattray suspends on this reason, that by the conception of the bond he has only right to the annualrent, and not to the principal, which is expressly provided to return to the debtor himself, it having been a donation and gratuity; and for the bygone annualrents, they are all punctually paid up. *Answered*, That the ignorance of country notaries cannot prejudice his right, Azo having long ago observed, that *eorum imperitia aliquando peribit mundus*; for it is plain, by the term of payment, viz. Whitsunday 1701, the parties designed that I might call for it after that time, else why was it put in? And the substituting of you is a mere destination, that if M'Intosh, the creditor, did not dispose on it in his own lifetime, then it should fall to Rattray, the substitute; and however it runs to me in liferent, yet I am truly fiar of the sum, and have the *jus exigendi* to uplift it; and you are only an heir of provision to succeed, if I have not otherways disposed on it. Yea of old, in Durie's time, if the first institute survived the term of payment, the LORDS found the substitution expired and evanished; and though my Lord Stair, B. 3. T. 5. § 51. says that the posterior decisions have altered this, yet still they

No 28.

No 29.

A party who had taken a bond to himself in liferent, to return to the debtor in fee, was found entitled to uplift, if the debtor was *vergens ad inopiam*; but the money to be re-employed on the same terms.