1665. *February* 1. MARY MELVIL *against* PATRICK YEOMAN.

WILLIAM WEIMES, merchant in Dundee, is addebted to Andrew Melvil, merchant in Edinburgh, and of Pittachop, 1000 merks. Andrew dies. His daughter, Mary Melvil, confirms his testament, and gets herself confirmed his executrix: then pursues Mr. Patrick Yeoman as executor to the said William Weimes, at least as having accepted a disposition from him of his estate, with the burden of his debts, and on the other passive titles. For verifying the libel, there is produced the bond, with the confirmed testament. As to the passive titles, refers them to the defender's oath; who compearing, deponed that he had indeed a disposition of some tenements and acres from the deceased, before his decease; but that the same was for onerous causes, and without any burden of the debts, or promise to pay the same.

The intromission upon this disposition found not to be vitious, neither to infer a passive title; and therefore assoilyied the defender from desire of the libel.

Act. Mr. Roger Hog. *Alt.* Mr. William Yeoman.

Signet MS. No. 35, *folio* 47.

1665. *February* 2. FRASER of PHILORTH *against* ANDREW FRASER of Stonnilwood.

SIR ALEXANDER FRASER of Fraserburgh, by an irredeemable alienation, dispones, with consent of the Lord Lovat and others, in 1616, to Alexander Fraser of Durres, the lands of Cairnebulge, within Aberdeenshire; whereupon he is infeft under the great seal. Alexander again in 1616, with Simon Lord Lovat's consent, irredeemably dispones the same barony to Andrew Fraser, then of Stonnilwood, afterwards Lord Fraser, goodsire to this Lord Fraser that now is; whereupon Stonnilwood is infeft therein in 1619 under the great seal. But he considering that others had right by comprisings or otherways to the saids land, anterior to his disposition; for his securer joysing of the same in time coming, he gets all the said rights settled and established in his own person, as particularly thir following; he gets a disposition to a comprising led in 1617 against the saids lands, by one Alexander Henderson, with the charters and sasines following thereupon; *item*, A discharge of the legal reversions contained in the saids apprisings granted to Stonnilwood by Fraser of Durres, who again ratifies of new his disposition he had made to Stonnilwood of the said barony. Then in 1621 obtains a decreet of improbation, improving Ogilvie of Dunlegus, Fraser of Fraserburgh, and sundry other persons their rights they might have to the said lands. There was also a comprising led at Forbes of Pitsligo, his instance, against the said lands, who thereupon was infeft under the great seal; *item*, Stonnilwood in 1620, causes be premonished to come and receive his money for which he had comprised, and so to hear and see the said lands redeemed; conform to whilk procuratory and instrument of requisition, Pitsligo compeared and received payment, as an instrument of redemption thereupon made bears, and so grants a renunciation, or grant of redemption in favours of Stonnilwood; then in 1621 obtains decreet of declarator of redemption of the

saids lands against Pitsligo, *in foro contradictorio;* whereupon Pitsligo grants him a renunciation of the comprising, upon which resignation of Pitsligo's he is of new again infeft under the great seal. *Item,* the said Alexander Fraser of Durres, from whom flowed Stonnilwood's rights, was sundry times, and for sundry causes, denounced rebel, and put to the horn, where he lay attour year and day, when his liferent escheat fell in the King's hands, and at his disposition; the gift whereof was given to Forbes of Balnagask; who, by his letters of assignation in 1625, dispones the said gift, with decreet of general declarator, obtained by him to Stonnilwood. Stonnilwood, the acquirer of thir lands, having been at all this pains to buy in all other rights that affected them, dies. His son, Andrew Lord Fraser, serves and retours himself heir to his father, and gets himself infeft in the said barony of Cairnebulge in 1637. He dying, his son Andrew, that is now Lord Fraser, retours himself heir to his father and goodsire, and so procures himself infeft in the said lands in 1651.

Fraser of Philorth pretends a right to the said barony of Cairnbulge, which they derive from Simon Lord Lovat, who was heritable proprietor of the said lands in 1624; sold away the same to Fraser of Fraserburgh; who again disponed them to Fraser of Durres, from whom the now Lord Fraser derives and draws his right. Upon this right Philorth intents a summons of improbation of my Lord Fraser's right to the said lands in 1657; in the improbation he calls for production making to him of Durres (Lord Fraser's author) his seisine of the lands of Cairnebulge; *item,* for the apprising led at Henderson's instance, the right whereof the Lord Fraser had got established in his person; and because the same were not produced there was certification granted by the then Commissioners against them for not production. The Lord Fraser intents a summons of review (conform to the act of Parliament 1661,) of the said certification, wherein he craved the same, as most unjust and unreasonable, to be recognosced, rescinded, declared null, &c. Whereunto he adds a declarator of property, craving thereby, that the Lords would declare him to have the only heritable and irredeemable right to the said lands and teinds; and therefore would discharge the said Laird of Philorth defender, from troubling him therein, &c.

The time of the discussing of this action, it was ALLEGED for the defender by his procurators, that no process could be sustained at the pursuer's instance upon the said summons of declarator of property, on the grounds libelled, *videlicet,* on several apprisings of several persons until they condescended upon the comprisings in special.

Whereunto it was ANSWERED by the said pursuer, his procurators foresaid; that they declared that *primo loco* they insisted upon the Laird Pitsligo and Alexander Henderson's apprisings, which are specially libelled; and upon the said pursuer his own right infeftment, and seasine produced; and that he should produce the grounds of his seasine *cum processu.*

Whereunto it was REPLIED by the said defender's procurators foresaid; that no respect could be had to the pursuer, his seisine produced by him as said is; because the same is improven, and a decreet with certification given out against the same.

Whereunto it was DUPLIED by the said pursuer's procurators; that the reply foresaid ought to be repelled, because the foresaid seisine was not *in rerum natura* the time of raising the summons of improbation, nor yet is called for therein, and so cannot be comprehended in the general words of the decreet; and oppone the same decreet to the reply.

Which said defender's reply and duply, together with the foresaid decreet of improbation, being all heard, seen, and considered by the said Lords; they found that the said Lord Fraser pursuer his seasine was nowise to be comprehended in the said decreet of improbation.

Thereafter it was ALLEGED by the said defender's procurators foresaid; that no process could be sustained at the pursuer's instance, as having right to Alexander Henderson's apprising; because certification is given in against the same particularly, in the decreet of improbation.

Whereunto it was REPLIED by the said pursuer's procurators foresaid; that he had intented an action of relief of that unjust decreet upon iniquity; and opponed the reasons of relief.

Whereunto it was DUPLIED by the said defender's procurators foresaid; that the foresaid decreet of certification stands good till it be taken away.

Which defence, reply, and duply, being also heard, seen, and considered, by the said Lords, they did delay to give answer thereto, and to the said action of declarator, till the said reasons of relief should be discussed; and ordained the said parties to debate therein.

Conform to the which ordinance, the said pursuer's procurators foresaid, having repeated the foresaid reasons of relief; ALLEGED that the pursuer had got wrong by the English Judges, in that particular of the decreet of improbation, granting certification against him for not-production of that apprising of Alexander Henderson's; because the time of the leading thereof being about the year 1616, it was ordinary then, and before the year 1624, when infeftments did pass upon apprisings, to leave the same at the Signet, when the precept was gotten out for the infeftment; and so this apprising being left at the Signet, at the passing of the infeftment thereupon, *in legali custodia*, it was not in the pursuer's power to produce the apprising, especially considering the loss of the registers, and things of that nature. And this defence, without ever calling these who kept the signet, or represented them, being proponed for the pursuer against the certification, was unjustly repelled, notwithstanding the charter under the Great Seal, and seasine thereupon were produced, and above thirty years possession; and repeated and produced a practique, the Earl of Nithsdale and the Laird of Westraw *in anno* 1628, thereanent.

Whereunto it was ANSWERED, by the said defender's procurators foresaid, that an apprising is nothing else but a legal disposition. When a party will not pay his debt, the law allows the Sheriff to dispone the debtor's lands, by the apprising to the creditor for his debt; and as it is absolutely necessary to preserve a voluntary disposition, with the procuratory, and instrument of resignation whereupon infeftment follows under the Great Seal, so it is also necessary to preserve the apprising. As to the old custom and impossibility, it being *in legali custodia*, it was farther answered by the said defender's procurators foresaid; that by the old pretended custom, if any was, yet they used to give in a copy or extract, and to keep another; which if the pursuer have neglected, *sibi imputet.* Likeas the said custom was abrogated before the year 1624; nor does *legalis custodia* maintain a bond or other writ being called for to be improven, from being lawfully improven, if the defender failyie in the production thereof. Was it ever a good defence, to say, it is registered, and the principal is *in legali custodia?* and repeated a practique betwixt the Laird of French and Blenchall thereanent. As for the long possession alleged upon, it is not relevant, though they would say

thirty-nine years; for there is nothing but forty years possession, with charter and seasine conform to the Act of Parliament, can maintain a man. As to the practique, it was answered, *de his quæ non sunt et non apparent idem est judicium*, so when it is produced, it shall be reviewed and answered. Neither can there be such a practique *in anno* 1628, that same being long before altered and innovated as said is. Likeas in this process, there are older apprisings produced, so if that had been the form, to leave them at the signet, how could they have them, they being older?

Whereunto it was REPLIED by the said pursuer's procurators foresaid,—That his reason of review stood yet relevant, notwithstanding of the answer; because there is a great difference betwixt a voluntary disposition made by one, and a legal or judicial sentence, not subscribed by a party; and they repeated a practique, *Lord Cranstoun* against *Turnbull*, where no certification past, for not production of the decreet of forefaulture. And for that, that another copy or extract might have been kept, attour that that was given in to the signet, it is not relevant, unless the defender will say that there was a necessity so to do.

Whereunto it was DUPLIED for the defender; that as a voluntary disposition subscribed by parties, (which is the ground of a public infeftment,) must be either produced, or else the infeftment will fall *funditus;* so a right subscribed by notaries when a party cannot write, or a subsidiary right to an apprising from a messenger, is as necessary to be produced, or else the infeftment is groundless. As to the practique alleged upon it, meets not; 1*mo*, Because it was much circumstantiate with sentencing, denunciation, hanging, as was notourlie known; 2*do*, It is a deed in the English time, and so subject to review, and so can be repute no practique.

Whereunto it was TRIPLIED for the pursuer, that the reason of review stands yet relevant notwithstanding of the duply. As to the act of Parliament, writs subscribed by the parties are only mentioned therein, and acts of Parliament are *strictissimi juris*. *Item*, this question about certification for not production of apprisings being debated before the Lords of Session *in anno* 1628, this same defence was proponed, and found relevant in manner contained in the practique produced in process, whereof there seems there have been two reasons; 1*mo*, Because the charter and seasine had never passed without the apprising, and thirty-six years possession had followed thereupon; 2*do*, Because it was left at the signet in *legali custodia*, and so not in the pursuer's power to produce. And as to the other practique, Lord Cranston *contra* Turnbull, this case is more favourable than that; for here the charter and seasin make out there was an apprising, which was produced to the Exchequer at the passing of the signature whereupon the charter followed: but his Majesty's representation upon Turnbull's forfaulture was and might be granted without any production of the decreet of forfaulture. And farther repeated a practique like this, recorded by the Lord Balmanno, namely, betwixt the *Earl of Mar* and the *Lord Elphinston*, where, in regard of the troubles, it was found there was no necessity of production of their retour, since their service was produced, the defender making faith that he had no more; and speaks of an act of Sederunt to this purpose in reference to Kirklands. And farther added, that Philorth could not now quarrel this apprising after charter and seising had followed thereon with thirty-six years possession; because he had taken an assignation to the order of redemption of the said apprising by the con-

tract *in anno* 1620, whereby he had homologated the same; and so cannot now quarrel it.

Whereunto it was QUADRUPLIED for the defender, that the decreet yet stood just, notwithstanding of the review, and what is added in the defence of it. And as to what is alleged by the pursuers upon the act of Parliament; it is ANSWERED, that the ground of this improbation and certification is not *the* act of Parliament anent prescriptions, but *jus commune*, whereby it is clear, that any infeftment (unless the grounds and warrants thereof be also produced if called for,) is taken away *funditus*; neither does this case quadrate with the act of Parliament, because there is not forty years possession here. As for the practiques above written, no respect can be had thereto, unless the case were formally extracted with the minutes, records, and interlocutors of process under the clerk's hand; for there may be many practiques hardled up not right disputed, and one altering from another upon several emergents and circumstances. As for the other practiques and acts of Sederunts, when they are produced, they shall get an answer. As for that out of Balmanno anent the retour, it says nothing, because the service is the special evident, and the retour is only the copy. And to Cranston's practique they opponed what was said in the duply above written; *item*, That the decreet of forfaulture was the sentence of a supreme court; *2do*, The notoriety that the person was hanged for that crime; *3tio*, It is evident that the registers and books of justice were abstracted at that time both before and after, &c. As to the triply of Philorth's homologation of the said apprising, because assigned to the order of redemption of the said apprising controverted; first, the said assignation is only to Pitsligo's apprising; *2do*, *Esto*, It were Henderson's, yet the defender when he suspected it to be false, he might not only pass from, but even quarrel the apprising: in respect whereof the decreet is most just, and the certification legally given for not production; especially seeing they have in the same summons a conclusion for reduction *ex capite inhibitionis*.

Before the Lords should give their answer upon the dispute above written, the pursuers craved they might be heard upon the remaining grounds of their declarator of property, *videlicet*, upon Pitsligo's apprising disponed in favour of the pursuer; *item*, upon his real right flowing from the laird of Durres by way of disposition, charter, and seasine following thereupon.

Which the Lords having granted, it was ALLEGED for the defenders,—That no process could be sustained upon Pitsligo's apprising, because it was led against Durres, who had no real right; in so far as, if he had any seasine of the said lands, the same is improven, and so is as if it never were.

Whereunto it was REPLIED,—That this allegeance founded upon the certification granted by the English Judges against Durres' seasine ought to be repelled; and notwithstanding thereof, the summons must stand relevant for declarator of property; *first*, because the pursuer stands heritably infeft and seased in these lands, and has been in possession thereof these thirty-four years bygone, and so having a real right should have a declarator thereof. *2do*, As to the certification against Durres's seasine, who was the pursuer's author, it is not relevant to stay the pursuer's declarator, unless the defender would allege that he has a better right than the pursuer; especially considering, that Durres's right flowed from this Philorth's grandfather, whose deeds he is obliged to warrant, and so cannot now quarrel the want of his seasine.

Whereunto it was DUPLIED for the defender,—That any real right that is extant in

the person of the pursuer was either by Pitsligo's apprising, or by a real right following from Durres: but so it is that both these rights are null in themselves, they being derived from Durres, who had no real right, as not being infeft, because any seasine he had was improven; *at nulla sasina nulla terra,* especially if a right be granted *a non habente potestatem.* As to that that the defender must shew a better right, or else he must not quarrel the pursuer's; since the defender is cited to this declarator, he need not produce a better right to stay declarator, but its sufficient for him to shew that the pursuer has no right: *nam si actor non probat, reus absolvitur.* And the Lords cannot declare it to be his property unless he clear his real right thereto; for seeing all that he produces are dispositions and charters in favours of Durres, and no real seasine in his person, that is only *jus ad rem,* and not *jus in re,* without which declarator cannot pass.

Whereunto it was TRIPLIED by the pursuers,—That there were charters, procuratories and instruments of resignation from Philorth to the laird of Durres, and sicklike right from Durres to the pursuer's predecessors, who thereupon were infeft; which is sufficient for the declarator. *2do,* The defender cannot quarrel Durres his right, because his predecessor did homologate the same by acknowledging Durres to be heritor, by contracting with him in the contract 1620. And opponed a practique betwixt Campbell and Maclean in *anno* 16—.

Whereunto it was QUADRUPLIED for the defender,—1*mo,* That he opponed his reply. *2do,* That any right the pursuer had derived from Durres or otherwise by apprising is still null, being a *non habente potestatem,* seeing he was not seised. Neither need he produce a better right, seeing many things are competent to a defender which are not to a pursuer. And as to the practique it shall be answered when produced.

Which allegeance, replies, duplies, triplies, and quadruplies being considered by the Lords, they repelled the allegeance *hoc loco,* unless the defender propone and allege a better right than the pursuer.

Thereafter it was ALLEGED by the defender; that certification being obtained against Durres his sasine, which is the pursuer's original right, without which he can have no real right, the property of these lands cannot be declared in favour of the pursuer, because the Laird of Philorth stands heritably infeft in the said lands controverted, upon resignation of the Lord Lovat, Lord of Carnesay, Gordon, and Darpersie, who stood infeft in these lands, long before any right made by Durres to Stonilwood; so that the defender having a right in his own person, and in the person of his authors, prior to the pursuer's right, there can be no declarator given, unless it were alleged by the pursuer, that Durres, (Stonilwood's author) had a real, consummate, and complete right in his person, anterior to Lovat, the defender's author, his right; but so it is, the pursuer cannot make it appear that there was any real complete right in Durres's person, or that he was infeft, seeing any seasine he had was improven as false, conform to the certification above written; and condescended that Lovat's infeftment was in anno 1616, anterior to Stonilwood's, which was not till 1619.

Whereunto it was ANSWERED for the pursuer, that the allegeance ought to be repelled, because any right flowing from my Lord Lovat, in favour of the defender, was principally from old Philorth, Sir Alexander this Lord's grandsire, and Lovat was only consenter thereto, and so any right made by him cannot be respected, because he was formerly denuded in favour of Durres by a resignation. Likeas Lovat is a consenter also in the right to Durres, and therefore could not thereafter dispone to Philorth. And any right Lovat had was

only in security of sums of money paid by him, by getting a proportion of land. *2do*, The defender cannot quarrel the want of Durres's seasine, because the defender is successor *titulo lucrativo* to his grandfather Sir Alexander, who made and granted right to Durres, whereunto the pursuer has now right in manner foresaid; so that if his said grandsire were in life, he could not stop this declarator, if the same was pursued by Durres, upon pretext that he was not infeft; so neither can this defender, who is *eadem persona*, at least representing him, stop this declarator, and condescended that this Philorth did represent his grandfather, 1*mo*, by intromission with the mails and duties of the estate of Philorth, wherein his grandfather died infeft; *2do*, He was successor to him in accepting an assignation and nomination in and to a clause of the contract *de non vendendo et vendendo, in annis* 1615 and 1616, and therefore has intented action of reduction against the pursuer, and so has made use of the same. *3tio*, There is decreet already pronounced against him as successor *titulo lucrativo* to his grandsire, at Nicolsone's instance.

Whereunto it was REPLIED for the defender, 1*mo*, Albeit Sir Alexander had been in life, and Durres also, yet without a seasine, Durres could never pursue his action of declarator of property. But *2do*, The defender denies he represents his grandfather as heir: and as to the intromission with the mails and duties, it was *singulari titulo, videlicet* by a right flowing from Carnusie, who stood infeft in these lands, and had undoubted right thereto. To the second part of the condescendence, that he accepted and made use of an assignation from his grandsire; it is answered, that by the law of this land to make one successor *titulo lucrativo*, there are two things requisite; 1*mo*, That he be *alioqui successurus*, and that *et tempore mortis, et tempore dispositionis*. *2do*, That he who gets the right *faciat lucrum* by the right, in none of which cases the defender was; for neither the time of the making the said right was he *alioqui successurus* or apparent heir, because this suspender's father was then in life, and not only apparent heir, but surviving him fifteen years, and *de facto* was heir served and retoured to him; so that the defender was neither apparent heir, nor *alioqui successurus*, nor could he be heir to him, he being only oy, and his father served heir; instanced in the case of a father disponing his estate, or any part thereof, to his daughter, where he had no sons for the time, but yet a son born thereafter; of disponing a part of his estate to his son, the third yet being in life, but dying immediately thereafter, without succession; could any of these be convened as successors *titulo lucrativo?* No, surely, since they were not both apparent heirs, the time of the disposition and the time of the father's death; and repeated the practique *Hamilton* contra *Farlan*, the last Session. *3tio*, The defender cannot be reputed successor *titulo lucrativo* by acceptation from his goodsire of a right to the said contract and clauses thereof, unless it were alleged that he had made profit and advantage thereby, which cannot be said unless he prevail in his reduction, and be assoilyied from this declarator; and the pursuer is in *pessima fide* to allege the defender to be successor upon that head, seeing in this very same process he craves the prices of the said to be in his favour, declared free of any action, intented or to be intented by the said defender upon these clauses; and therefore, except it were alleged that the defender accepted and made use of a profitable and effectual right from his goodsire, without onerous cause, he ought not to be repute and liable as successor *titulo lucrativo*.

Whereunto it was DUPLIED for the pursuer,—That there was a great difference betwixt descendants *in recta linea*, and *in linea collaterali;* and although

amongst brethren the case might hold, yet the father and son being in the direct line descendant, they ought to be repute as one person, otherwise great inconveniences might follow to the lieges, if goodsires might dispone their estates to their oyes, in preference to their sons and creditors; instanced the practique betwixt the Lady Swinton and her oy, the Laird of Swinton, wherein a disposition being made by the goodsire to his oy, of his estate, without any onerous cause, the oy was found successor *titulo lucrativo*, and so forced to fulfil the lady's contract of marriage; nor needs the pursuer debate whether the defender was *hæres immediatus* or *mediatus*; it is sufficient that, as oy, he was *hæres apparens*, and got the right without any onerous cause; especially seeing its presumable that the goodsire and father did concur in the design to settle the estate on the oy, being then eldest, and *hæres apparens*. And as to that that the father was heir, served to the goodsire, it is not relevant, unless they allege special heir, and infeft in the lands controverted; otherwise a factor might be general heir, and uplift the moveable heirship, and yet not enter to the heritage, in prejudice of creditors: opponed the law of the land, introduced in favour of creditors, whereby, if a son make use of the least of the heirship goods, it makes him liable to all his father's debts; nor does law require *in titulo lucrativo quod lucrum cæpit*; but where the cause of the disposition is not onerous but for love and favour, so that if any oy have accepted a right from the goodsire, for love and favour, without any onerous cause, and made use thereof, he must be repute successor *titulo lucrativo*; much more in this right made to the oy, in defraud of Durres, *inter conjunctas personas*, and so reducible by act of Parliament. And, albeit he cannot be repute *simpliciter* successor *titulo lucrativo*, yet he must so represent him, as he cannot stop his declarator no more nor his goodsire could do if he were in life.

Whereunto it was TRIPLIED for the defenders,—That they opponed the former answers; and farther alleged, that *successio titulo lucrativo*, is of its own nature conformable, seeing thereby if an heir did but accept of one chalder of victual from his father, without an onerous cause, he would be liable for his father's debts, preceding his right, were they never so great; and all laws and customs, especially in *materia dura et odiosa*, being *stricti juris*, admit of no extension. And the distinction made by the pursuer, of descendant and collateral succession ought not to be obtruded, to put the case in hand without the reach of law; seeing, by the law and custom of Scotland, as is clear by Balfour, Hope, Durie, and especially Craig, *Dieg. de successionibus*, it is not controverted whether, to make a man successor *titulo lucrativo*, he must be *alioqui successurus et suus immediatus hæres*, or no. And the distinction of collateral and descendant succession in this case, is neither warranted by law nor authority of doctors, nor by the shadow of any practique in this kingdom, except the practique adduced; which as it was singular, so is far different from this case, and cannot invert the course of law; for he not being *suus*, but *extraneus hæres*, he cannot be said *capere hæreditatem suam vel præcipere*. And as the defender could not be quarrelled, as intromitter with heirship goods, or rents of land pertaining to his goodsire, his father being in life, so neither can he be convened for accepting the said disposition, specially seeing his father was served heir to his goodsire: nor needs there a special service, seeing the right itself falls under general service; and so *per rerum naturam* the defender could not be heir, and so *nec successor titulo lucrativo*. *2do, Titulus lucrativus* being only a subsidiary passive title, introduced where other passive titles are wanting, and as no intromitter can be liable, or con-

vened, where there is an executor confirmed; and none behaving himself as heir, where there is an heir served and retoured; and so none can be called as successor *titulo lucrativo*, where there is one served and retoured, as in this case, because the penal and passive title which makes the defender liable to his goodsire's obligements ought not to extend beyond the conception of the law. As to the practique it noways meets, because the goodsire survived the father, and the right was of the whole estate; the pursuer was Swintone's lady, for her liferent, conform to her contract of marriage, which is a most favourable pursuit; but here not only did the father survive the goodsire, but was served heir to him, and the estate is inconsiderable, being only the reversion of fifty chalders of victual, upon payment of L.38,000; and is not as yet become an effectual right, neither ever yet got he benefit thereby. As to the inconvenients deduced, they ought not to be respected, because successor *titulo lucrativo*, is only liable for debts prior to his right, and such debts cannot be defrauded, because they will be either liable on that title, or else they will reduce on the act of Parliament, as made *inter conjunctas personas*. And as to that, that it is sufficient that the defender accepted the said right, without any onerous cause, though *non præcepit lucrum*, its TRIPLIED, that *lucrum* is naturally implied in that title, for it is not a universal title, as behaviour as heir, or intromitter, but a partial passive title, and liable to debts preceding the right, in respect of the profit had thereby. As for the allegeance, that the accepting of this right should make the defender, in so far at least successor, as not to stop this declarator, no more than his goodsire could do; its answered, that if the defender had formed any allegeance upon any right made to him by the goodsire, for stopping the said declarator, the pursuer would have some ground, but seeing the defender's exception flows from my Lord Lovat, he ought not to be debarred from the benefit of the law, upon the pretext, as though he were successor *titulo lucrativo*, though it is evinced by what was formerly said, that he neither is, nor can be legally heir. And as to the act of Parliament anent rights *inter conjunctas personas*, when the pursuer shall insist upon that head he shall get an answer. Likeas, this deed is before the act of Parliament. And to the third part of the condescendence, that he was successor *titulo lucrativo* by a sentence obtained by Nicolsone, it is denied; yea, on the contrary, he was by interlocutor assoilyied, and so Nicolsone took up his process. And though there had been such a sentence, yet being in the English's time it cannot be looked upon as a practique; in respect of all which no declarator can be granted.

All which dispute the Lords having considered, having perused the minutes, they called the parties and desired the defender to condescend from whom his right followed, who declared his right alleged on did flow from the Lord Lovat, who had recovered an assignation to an apprising led by Pitsligo against old Sir Alexander, the defender's goodsire, and also from Carnusie.

Whereunto it was REPLIED for the pursuer,—That any right Pitsligo or Lovat had to these lands, was only an apprising of 54,000 merks, which being paid to Lovat (having right to the apprising by assignation,) by the price of the lands of Innerlochie sold to and accepted by himself for the sum of 32,800 merks, and 18,000 merks paid further by Durres for the lands of Innernorth, and 3500 merks paid by Philorth, which completes the said sum of 54,000 merks; and so the apprising being paid, became extinct, and could not be disponed thereafter by Lovat to the defender; especially all these transactions being clear and notour to old Philorth, who was party contractor and consenter with Lovat *in uno eodemque*

contextu, both in the contracts 1615 and 1616. And as to Carnusie's right, it is not relevant, because there is a certification granted against the same, at the Lord Fraser's instance, in 1621.

Whereunto it was DUPLIED for the defenders,—That the reply foresaid ought to be repelled, unless the pursuer will offer to prove that Lovat had legally and formally renounced the said apprising, and that the renunciation was registrate; otherways any person seeing Lovat infeft under the Great Seal were *in bona fide* to take rights from him, and clothe themselves therewith: for as a wadset right is never taken away without a legal renunciation and registration thereof, so neither an apprising, which is in effect a judicial wadset, while the debt be paid, renounced, and registered. And the defender is not contractor in the contracts 1615 and 1616, neither could he, he being then minor, yea, within the years of pupillarity.

Whereunto it was TRIPLIED by the pursuer,—That there is a great difference between a wadset and an apprising, both as to the manner of the constitution and manner of their dissolution; for by intromission, before the legal expire, it is declared that an apprising may be satisfied; and this is not only to be understood of intromission with maills and duties, but otherways *quocunque modo*, it extinguishes the apprisings, and the defender was in *pessima fide*, to take any right from Lovat, since he knew he was paid, and was contractor in 1615; which being all *in unico contextu*, he cannot be heard to allege ignorance. Neither does the act of Parliament, ordaining renunciations to be registrate, mention renunciations of apprisings; likeas this payment alleged was *in anno* 1615, whereas the act of Parliament was not while 1617.

Whereunto it was QUADRUPLIED by the defenders,—That they opponed their former duply; and added that apprisings must either be paid by intromission with the maills and duties before the expiration of the reversion, conform to the act of Parliament, which (as all acts) is *strictissimi juris*; or else the translation or renunciation thereof must be registered, conform to the other act of Parliament; for though it mention not renunciations of apprisings, yet it speaks of all renunciations in general, and ordains them all to be registered, that parties may be put in *mala fide*. Which not being done, the defender was not *in mala fide*, but might very well take a right from the Lord Lovat.

Which declaration, reply, duply, triply, and quadruply, above written, being seen and considered by the said Lords, they repelled the allegeance in respect of the reply, bearing that Pitsligo his apprising was extinct, by payment and satisfaction made, either by money, or by accepting of land before the expiry of the legal reversion thereof. And that apprisings differ from wadsets either proper or affected with back-tacks, and so that apprisings need no legal renunciation; and assigned to the pursuer a day for proving of the said reply. At which day the pursuer produced the foresaid two contracts in 1615 and 1616, for proving thereof. Which being seen by the defender's procurators, it was alleged by them that they proved not the reply, because the apprising alleged upon was dated in 1609, and the Lord Lovat's right thereto is not till 1617, which is more nor seven years thereafter; but so it is, that he could not be paid before he had a right to the same. Whereunto it was answered for the pursuer, that though the apprising be in 1609, yet by the contract 1615, the Lord Lovat obliges him to recover a right to the said apprising, and thereupon accepts satisfaction for the same; and therefore is as sufficient as if he had then been really paid in downtold

money. Likeas *de facto* there were 20,000 merks paid at Whitsunday 1615, the pursuer craved that the Lords would peruse the said contracts, and this they repeated in *modum probationis.*

Which dispute the Lords also having considered, together with the writs produced for the pursuer, they found the reply above written, upon the points of the said summons, sufficiently proven by the contract and remaining writs foresaid produced for the pursuer; and therefore repelled the allegeance founded on the defender's right, as flowing from Lord Lovat; and gave forth their decreet in manner underwritten. They find and declare, that the irredeemable right of property of the said lands, barony of Cairnebulge, &c. comprehending such and such lands, &c. with the teinds, pertain and belong to the pursuer; and that the same is established in favours of the said pursuer, as heir by progress to the deceast Lord Fraser, his goodsire: and, therefore, the said Lords discharge the said defenders from all farther troubling, pursuing, or anyways inquieting the said pursuer, in his said right of the said lands in all time coming, &c.

Act. Sir John Fletcher, king's advocate; Sir Peter Wedderburn of Aberlady; Mr. Robert Sinclair, Mr. George Norvell, Mr. Andrew Birnie, Mr. George Mackenzie, and Sir Thomas Wallace. *Alt.* Sir Jo. Nisbett, now king's advocate; Sir Jo. Baird, Mr. Jo. Cunnynghame, Sir Geo. Lockhart, Pat. Fraser and Ja. Brown.

The dispute is most incorrect in the register. Da. Dick.

Signet MS. No. 40, *folio* 48.

1665. *February* 4. WALTER OGILVY of Boynd *against* The EARLS of FINDLATER, AIRLEY, and HADDINTON, SIR PATRICK OGILVIE of Inchmartin, LORD BAMFF, and OTHERS.

IN *anno* 1626, the lands of Boynd, belonging to Pat. Ogilvie of Boynd, falling in ward through the heir's non-age, the same are disponed by the king to the Lord Bamff. He, by his assignation, constitutes Ja. Earl of Airley, donatar thereto; who, by virtue of the gift and assignation thereto, intromits with the maills and duties of the whole barony or Thanedom of Boynd, from 1626 exclusive to 1636 inclusive. Then the heir, Walter Ogilvie, calling the said Earl to an account for his intromissions, there is a submission condescended to by both parties, wherein Thomas, Earl of Haddinton is oversman. Upon it follows a decreet arbitral, in March 1637; conform to the tenor whereof the said Laird of Boynd grants a discharge of their whole intromissions with his living, during his minority, to the said Lord Bamff, and Earl of Airley his assignee; *item*, grants discharges to Ja. Earl of Findlater, Lord Deskfoord, and Sir Pat. Ogilvie of Inchmartin, his curators, of their intromissions and tutor counts. Then for 19,000 merks lent him by the Earl of Findlater, he wadsets to him the lands of Over and Nether Dollachies: *item*, for 50,000 merks alleged borrowed from Inchmartin, Boynd wadsets to him the manor place of Boynd. Both thir contracts are in 1644. Upon thir wadsetts, having once used horning and denunciation, the Earl of Findlater, made assignee to Inchmartin, in 1649 apprises Boynd's lands, and is thereon infeft. Boynd raises a summons in the English time against Earl of Findlater, Earl of Airley, Earl of Haddinton, Inchmartin, Lord Bamff, and others, for ex-