they find his annuity and right of liferent is a real burden affecting the fee conveyed by Mr William Wallace, the disponer, and does burden these two thirds of it come in the person of Oughtred Macdougall; and this, notwithstanding the faculty exerced by granting the foresaid liferent, was not conveyed in favours of the pursuer by an infeftment, nor was his foresaid liferent-right expressed in Oughtred's seasine. And therefore prefer Captain Hunter to the Creditors of Oughtred Macdougall. And also prefer the relict upon her bond of provision. And find the allegeance, proponed by the creditors against it, is not receivable by way of defence; but reserve action at the Creditors' instance against the relict, as accords. *Vol. I. Page* 228.

1680, 1681, 1682, *and* 1683. JOHN ELIES and the EARL of SOUTHESK *against* The DUKE of HAMILTON.

1680. *June* 17.—IN the action for proving the tenor of a bond, pursued by Mr John Elies, elder of Elieston, against the Duke of Hamilton; the Lords having allowed Mr John to lead his old witnesses, it was objected against Sir Michal Nasmyth of Posso, that he was a bankrupt, lying in prison for debt, and not worth the King's unlaw.

This was repelled by the Lords: but this they sustained to reject him, that he had threatened to do Duke Hamilton an evil turn. Only, objections against witnesses should be instantly verified. See *24th Dec.* 1680.

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1680. *December* 24.—In Mr John Elies's action against the Duke of Hamilton for proving the tenor of a bond; ALLEGED, The *casus amissionis* of the bond was not fully libelled. ANSWERED,—The summons bore, that the bond was lost and amissing, and *casus amissionis* in proving tenors is *inter ea notoria quæ allegari quidem debent sed non probari.* REPLIED,—Though they be not burdened to prove the *casus amissionis*, (which ofttimes is latent and impossible,) yet it must be specially condescended upon, that the defender may object against it; and that, by a general, *(in quibus latet dolus,)* we preclude him from redarguing and convelling it.

The Register gave the Lords' answer upon this; but, in his own sentiments, he repelled the allegeance. *Vide 22d Jan.* 1681. *Vol. I. Page* 124.

1681. *January* 22.—In Mr John Elies's cause against Duke Hamilton, (24th Dec. 1680,) the Lords found,—if the action for proving the tenor had come in *incidenter*, upon another principal action depending between the Duke and him,—they would have granted a summary enrolling and hearing thereupon, in the Inner-House, as they did lately in Lady Mary Cunningham and Sir John Maitland's case against Cardross: but here they could not; because the process, whereon the proving of the tenor depended, was only betwixt Southesk and Elieston, and therefore Elieston behoved to enrol *in communi forma. Vide 26th Nov.* 1680, *Lockhart;* and 16*th June* 1681, thir parties.

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1681. *June* 16.—In Mr John Elies his action for proving the tenor of a lost bond against Duke Hamilton, (22d Jan. last;) Alexander Gelly, writer,

being adduced as a witness, and it being objected against him that, by a letter written to Elieston, he had declared what he knew of that bond, which was *proditio testimonii:*

ANSWERED,—A witness might lawfully do this, where there was no good deed neither given nor promised.

This being reported by Nairn, the Lords found the objection amounted to this importance, that he should only be admitted *cum nota.*

In the same cause, upon another report of Nairn's, the Lords, on the 21st June 1681, found Alexander Gelly's letter ought to be delivered up to him, before he be obliged to depone, and ought not to be keeped over his head, as a check to curb the freedom of his testimony, or to found any pretence of perjury against him, if his deposition should happen to differ from what he had written. *Vol. I. Page* 142.

1682. *February* 7.—Mr John Elies and Southesk's cause against the Duke of Hamilton, (22d Jan. 1681,) being advised; the Lords found the *casus amissionis* sufficiently instructed; and sustained the adminicles adduced. And found, by the writs and depositions produced, the tenor of the £1000 sterling bond was fully proven; and therefore decerned in the said tenor.

Duke Hamilton clamoured how dangerous this might be, to make up personal bonds which might be satisfied, retired, and cancelled, without taking a discharge, which many did not judge necessary, and that by the depositions of witnesses; and what made it the harder was, that the *testes instrumentarii, viz.* Robert Kennedy and Hamilton, did not remember distinctly, their subscriptions not being present to show them for refreshing their memories; but there were many adminicles in writ here. Anent *non memini,* see Balmano's Practiques, *tit.* Improbation; and Dury 1636, *Lord Banff.* *Vol. I. Page* 171.

1681–2. *Session.*—In Mr John Elies his proving the tenor against Duke Hamilton, (7th Feb. 1682;) Sir Michael Nasmyth of Posso being adduced as a witness, the Duke objected that he was a bankrupt and in prison for debt. The Lords notwithstanding admitted him.

Yet I find Mascardus affirms *carceratum non plene probare ut testem, sed recipi debere cum nota.* *Vol. I. Page* 182.

1683. *March* 2.—The Earl of Southesk and Mr John Elies against Duke Hamilton, (mentioned 7th Feb. 1682,) is reported by Saline. The Lords sustained the summons for payment, though dated before the decreet making up the tenor of the bond, seeing the debt was in being before that decreet; but allowed the Duke to propone compensation on debts either already liquidated or shortly liquidable.

The words were:—Sustain process, notwithstanding of the allegeance proponed by the defender; but declare that what the defender's procurators shall propone by way of compensation, being *de proximo liquidandum,* they will receive the same in this process, it being always liquidated before sentence to be obtained by the pursuers. *Vide infra,* 22d current. *Vol. I. Page* 224.

1683. *March* 22.—The Earl of Southesk and Elieston against Duke Hamilton, (mentioned 1st March 1683,) being reported by Saline; the Lords,—before answer to the defence upon the order of discussing Duke William the debtor's heirs of line, *viz.* his daughters, before the present Duchess of Hamilton, who is but his heir of tailyie, and the condescendance on Inverwick as the subject of the discussion,—ordain Southesk to produce his contract of marriage,

containing a renunciation of all that his Lady, one of Duke William's daughters, could claim, save only this legacy of Mr Livingston's bond of £1000 sterling, now pursued for; and the Duke to produce the obligement given by the heirs of line, that they shall relieve the heir of tailyie, also founded on.

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1683. *March* 22. The EARL of TWEEDDALE *against* The TENANTS of PINKY.

THE Earl of Tweeddale charger, against the Tenants of Pinky, reported by Boyne. The Lords found the letters orderly proceeded; and sustain the Commissaries of Edinburgh their decreet; in respect of the probation, and the Act of Parliament 1633, modifying the teind to the fifth part.

Yet that Act was mainly for heritors and titulars, and not for masters and tenants; and, though they were really damnified by that low valuation, (the fourth part being the true intrinsic value,) yet they had an ease by the overrunning of the mettage of the acres, and were free of the expense they would have been put to in leading away their own teind. *Vol. I. Page* 228.

1680, 1682, *and* 1683. The EARL of MARISHALL *against* His WADSETTERS and VASSALS.

1680. *February* 28.—IN the Earl of Marishall's improbation against his vassals and wadsetters, it was ALLEGED for one, You cannot crave certification against my rights, because I offer to prove any title you pursue by is apprisings which were bought in by the Earl your brother's means, from whom I got my right, though they were taken in Major George Keith's name as trustee; and so they must accresce to me in warrandice, *nam jus venditoris accrescit emptori.*

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1680. *June* 10.—The E., as he who hath acquired some comprisings upon that estate, pursues the wadsetters to count and reckon for their intromissions.

ALLEGED,—They cannot be liable, upon the 62d Act of Parl. 1661, to count for the superplus duties over and above the annualrents of the sums contained in their wadsets; because this Earl's brother, when he was heritor, gave them a discharge thereof, as having counted to him for the same.

REPLIED,—This declaration and discharge of the debtor's cannot prejudge other creditors whose rights this Earl hath now, *ex titulo singulari,* acquired; but they must account for the superplus, and not keep up their debts as unpaid, to seduce and debar other creditors (who are posterior,) from coming in in their just ranks.

This was taken to interlocutor. *Vol. I. Page* 101.

1682. *March* 28.—The Lords ordained this point to be heard *in præsentia,* Whether or not an apparent heir, acquiring in an expired comprising on his predecessor's estate, and by it calling the wadsetters to count and reckon for the superplus rents, more than pays them their annualrents, on the 62d Act, Parl.