or necessary use they had to do with the writs, when they were exhibited, as the bond required. They jangled long that they needed not, and Alexander pursuing a declarator of recognition, they had cause to crave a sight of the writs to know how the lands held.

The Lords found they behoved to condescend on some use: and as to that pretence of the declarator, we answered,—Alexander was necessitated to take the gift of that recognition; because being incurred by the colonel's own deed, he was aiming to have been made donatar thereto, and so have swept away the estate from Alexander; in respect whereof, he could never doubt but there was a recognition committed. *Advocates' MS. No.* 613, *folio* 294.

1677. *February* 20, *and July* 12. The EARL of ROTHES *against* LORD MELVILLE, and his SECOND SON.

February 20.—THIS day the Earl of Rothes, Chancellor, (Sir William Bruce's name is in the gift of nonentry,) gained his action against my Lord Melville and his second son. The Lords found Melvill's son could not be served heir of tailyie to the last Countess of Leven, during the possibility of a second son of my Lord Chancellor's body, (for the devil must bide his day,) and prefer Sir William Bruce's gift.

Thereafter, on the 26*th of February*, on a bill given in by Melville, and a debate following thereon, representing that they could not prefer Sir William's gift, since there was not a *verus contradictor in campo*, without which, the process would be utterly null and void; Melville was not, for he had no member of the tailyie; his son was minor, and might say next day his father had collused, and so *res inter alios acta* could not prejudge him.* The Chancellor had taken much pains to have out his decreet, extracted, (the 24 hours after the reading in the minute book, and 12 hours after the giving out of the scroll to the adverse party being past,) before this bill came in, but Mr Alexander Gibsone, clerk, with much rudeness and passion refused it; undoubtedly he was authorised so to do by the President, else one so timorous as he had not done it. However, the Lords this day take back what they gave, and some of them who were clear for him the time before, as Argyle, &c. change on him. Halton stood firm to him. The Lords resolved to leave a buckle loose for overawing him and keeping him quiet, betwixt and June; they reserved always to debate upon the gifts in the special declarator, (which they minded to intent before the sheriffs where the lands lie,) whether it be a nonentry in the King's hands, or if it be lying *in hæreditate jacente*. Which is a most ridiculous fancy, there being no *hæreditas jacens* known by the law of Scotland, but in favours of creditors when apparent heirs renounce; and there is none in the feudal law, where the King must always have a vassal. He was forced to take his decreet with this clog at the tail of it, and extract it with that quality, because they would not give it him otherwise. They aim at a sequestration of the rents in a third party's hands during the dependance, and possibility of a second son, and Melvill's second son's seclusion;

* *Lex* 30, § 1, *D. De acquirenda et amittenda hæreditate* makes for this case. *Proximus hæres a partu qui in utero esse creditur hæreditatem adire nequit quamdiu incertum est an nascatur nascive possit qui in utero est.* See Bronchorstius *ad legem* 187 *D. De Regulis Juris.*

which resolves in a clear fidei-commisse. The way to shun such an inconvenient of the pendency and vacancy of a fee for want of a vassal, where a possible heir not yet existing, is designed to be provided to lands, is and must be hereafter; if a father have a prodigal son, (as was in Eglington's estate,) or a man a brother in whom he will not trust the fee of his estate, but only make them a liferenter, but yet would settle it upon the children of his body, which are only possible, and not as yet existent, lest caducity be incurred, a certain person must be infeft to the behoof, and for the use of the said son *in spe et possibilitate*, like the English feoffees and trustees. See Littleton's Feus, and Cook's Comment on him. See *28th February*, 1679. The only hazard and inconvenience of this is, that you must let the fee run the risk of all the delinquencies of the trustee, that is to say, of the superior's casualities by ward, marriage, non-entry, liferent-escheat, forefaulture: yea, though the infeftment should bear that express quality, that his commission of crimes or contumacy, should not prejudge the person for whose utility the fidei-commisse is made, it would not bind the superior, nor be esteemed as *pactum validum*.

To resume the arguments were used in the debate, would swell to a great bulk, and were unnecessary, especially since they may be read in the information beside me. But I shall only touch at some few remarks and observes of my own on the affair. It is a principle in law, and to be read in Bartholomæi Socini *Fallentiæ juris, regula* 1. *Ablativi absolute positi inducunt conditionem, et pendente conditione non debetur legatum relictum;* now the formula by which our tailyies are conceived, *quibus deficientibus*, Quhilks failyieing, are *ablativi absolute positi; ergo*, they make a condition, till which be purified nothing is due to Melvill's son. *2do, per legem* 11 *D. de testamentaria tutela, Quamdiu speratur tutor testamentarius, non est locus dativo; ergo quamdiu* there is *spes* of the nearer member of the tailyie, of my Lord Chancellor's body, *non est locus substituto. 3tio, in edicto Carboniano, Si quæstio fiat pupillo de statu an ingenuus necne, mittitur tamen in possessionem, dilata cognitione ingenuitatis usque ad pubertatem:* And with us by act in 1503, a widow seeking her dowry (terce,) and questioned as not lawful wife, is, during the dependance of the plea and trial, put in possession of her jointure *provisionaliter; ergo*, so should the Chancellor during the possibility. On the other hand, for Melvill's second son; it is an ordinary brocard of law, *semel hæres, semper hæres; semel exclusus in substitutionibus, semper censetur exclusus.*—Vinnius, the most learned of all the late writers, *ad parag. nonum Institutionum de hæredibus instituendis, numero 5to; item ad titulum de substitutione vulgari;* who tells that *istæ subtilitates juris civilis*, that *hæres non potest institui ex die vel ad diem, recesserunt ab usu et moribus plærarumque gentium*, (which makes for the Chancellor's case;) *ergo*, if the Chancellor were admitted in hopes of the possibillity, Melvill's son could never come in upon the extinction, *quia non datur hæres temporalis.* See Craig, *feud. pag. de successione quadam possibilitate successionis extincta;* see in another paper beside me, this case of the tailyie of Levin stated and argued, and if *dominium* (*feudum*) can be *in pendente;* see Stair's system, in the case of *Major Bannatyne* and *Weir of Blaickwood*, debated in 1647; *item*, of late, a case, wherein my Lord Halten was concerned, anent the secluding the possible heir of tailyie, and preferring the existing; but it was done of consent and by collusion. *2do*, A son dies who was infeft in lands; the father succeeds and will be retoured his nearest lawful heir, though there be a nearer in possibillity, viz. the defunct's brethren and children to the father, who may be gotten, and will seclude; and he may enter while there is hope of them. The true fortress and refuge of Melvill's advocates

was to deny it could in law be pactioned, that an heir not existing should make the institution hang in the air till the possibillity expired; but when the fee opened, and he not extant, then the nearest in being ought to succeed. *Item*, arguments may be drawn *a jure postliminii et fictione legis Corneliæ;* even so here, let the eventual condition be expected and retrotracted when it exists: but all thir topical parallels are twenty miles wide, and halt *ambobus pedibus.* See Hermannus Vulteius, *de Feudis, lib.* 1, *cap.* 7, *No.* 68, *et seq. pag.* 152, *et seq.; item cap.* 9, *No.* 78, *pagina* 357. *An casus possibilis, fortuitus, dubius, vel incertus, sit expectandus;* see Bartolus, *ad Novellam* 2*dam, cap. Hoc autem,* 2*do; numero* 6, *de non eligendo,* 2*do, Nubentes, pagina illi* 120. *Hæres in herba* is a Latin proverb; see it in Erasmus his *Epitome Adagiorum, verbo Eventus Incertus, pagina* 287. *Vide* on this subject, *Legem* 17 *D. de Vulgari Substitutione; L.* 127 *D. de Legatis, primo; L.* 10 *D. de Hæredibus Instituendis; L.* 3 *C. Quamdiu; L.* 68, *L.* 83, *D. de Acquirenda et Amittenda Hæreditate, ibique* Bartolus. And yet most of thir laws speak *in postumo; quæ est possibilitas proxima,* and does not meet the Chancellor's case. *Vide Legem ab Avo,* 102 *D. de conditionibus et demonstrationibus; Quos primo nominavit majore pietatis affectu amâsse præsumitur;* and so the Earl of Levin must be supposed to have preferred the Chancellor's second son, in his affection, before Melvill's, and not intended it for a mere empty compliment, since the Chancellor the time of the tailyie had no sons, nor any great probability of them. *Etiam cuivis incertæ personæ hæreditas jure novo relinqui potest; L. unica C. de incertis personis; ibique Cujacius, in paratitlo.* As to conditions, one Philibertus Bruxelius (because born at Brussells) hath written a large treatise, *de Conditionibus Suspensivis, Devolutivis in diem, &c. De dominio in pendenti,* see Antonii Fabri Sebusiani *Consultatio de Montisferrati principatu, et* Jacobi Menochii *Responsa de causa Finariensi.* Sir George Lockhart, in his Information, cites one Cæsar Argelus as a late author writing on this purpose; (printed at Paris in 1669; he writes also *de legitimo contradictore.*) As to fiduciaries in tailyies, see Cujacius, *in Paratitlo ad titulum* 30, *libri* 5*ti Cod. de legitima tutela, ubi disserit de tutela fiduciaria. De cretione et institutione post diem;* see Cujace *ad Titulum* 9, *lib.* 6*ti, Codice, Qui admitti ad bonorum possessionem possunt; ibidem* to consider him on the titles, *de Successorio edicto, et de repudianda bonorum successione,* where if a person repudiate the inheritance *locus fit remotiori. Vide* Caroli Molinæi *Consilium primum,* where there is a contingent case; *et pagina* 11*ma in calce,* he says *caducitas intermedii gradus non excludit sed intromittit sequentem;* which makes for Melvill's second son. On the Chancellor's interlocutor there was a roundell made: *ens reale* (*id est* Melvill's second son,) craves to be preferred, *ad quantum et ad quale ens reale,* but I (*id est* the Chancellor,) say *nihil tale,* until I be interred; *ens reale* craves for to be served.

As to the original of tailyies in Scotland, with clauses irritant in case of contracting of debts, or not taking the name, &c., they are very late; the first of them are within these 60 or 70 years; what was first in Scotland was the *Laird of Calderwood's* tailyie of his lands, advised by Sir Thomas Hope; then there was one *Duncan's*; then there was *Thomas Moodie's,* as to the lands of *Sauchtonhall;* then *the Viscount of Stormont's,* as to the estate of *Annandale;* and many since, though the President in his system has declared himself no friend to such clauses.

In the tailyie of the *Dukedom of Hamilton,* it is provided that all the successors shall be of the Protestant religion, and if they forsake it, then by an irritant clause, the estate shall devolve and descend to the next in blood; it likewise bears that

none of them shall ever bear arms against the King or his authority, but shall ever assist him in all his wars, under amission of the feu. *Quæritur*, if thir clauses were inserted by themselves or the King. I hear of rare clauses inserted in *Mr Robert M'Gill, Lord Foord*, his charters of resignation, bearing a legend of his life. See some of his writings and collections *apud me*. See *8th November*, 1677, *No.* 650, § 2. *Advocates' MS. No.* 548, *folio* 275.

1677. *July 24th.*—The Chancellor's cause with my Lord Melvill, which he gained in winter last, on the *20th of February*, 1677; (see it, *No.* 548,) is now again revised and disputed; Melvill having borne it off all this summer session, (notwithstanding all the solicitation the Chancellor did make for a hearing,) till my Lord Lauderdale's arrival here: and he being come, Melvill turns the chase and obtains a hearing, which the Chancellor would gladly have shifted; and by my Lord Lauderdale's presence overawing the Chancellor's friends, he gains the cause: for the Lords this day found the King as superior of the estate and Lordship of Levin, had right during the vacancy to the retoured duty, (by which taxations were imposed of old.) Which retoured duty General Lesly had chosen to be a feather to denote his calling as a soldier, but Dundonald had lately converted and changed it into L.100 Scots yearly: and the truth is, retoured duties are always in money, though feu-duties may, and oftimes are, in other kinds of things. But as for the maills and duties, the Lords found they were not *bona caduca*, and nowise in non-entry, there being here no contempt nor fault against the superior, so much as presumptive or interpretative, which is requisite to all non-entries; but that they were *bona vacantia* and lying in *hæreditate jacente*, (though this was a new notion of it, never before heard of in our law,) and so fell under administration, and would belong to a *curator bonis datus (Vide Titulum istum de curatore bonis, in Digestis,)* from the King, who would be accountable and find caution; and reserved to both parties to debate upon their gifts, who had the right to the retoured duties.

See Andreas Gaill, *libro 2 Observationum, cap.* 130.

In ordinary non-entries, the retoured duties are only due before citation in the declarator; and if the vassal do not endeavour to enter, then the full maills and duties are due after that citation. Why the superior here in this vacancy is in a worse case, *non video.* Why he has not the full maills and duties *medio tempore*, but only the faculty of the nomination of an administrator to the behoof of the next heir that shall enter, which seems prejudicial to the King's casualties,—let our Gudelinus, who practises the *jus novissimum* so much, answer for it. Yet they alleged that the lands could not be in non-entry; because there was never a non-entry but where there is a *culpa et contemptus vassalli, intrare differentis; quod est quasi delictum, et ideo punitur jure feudali;* (yet in ward the minor is in non-entry *sine sua culpa*, for he cannot enter though he would;) and non-entries being odious, are not to be extended to cases where there is no *culpa*, for *ubi non est culpa, ibi nec debet esse pœna;* and Craig, *pagina* 279, tells that Mr William Oliphant did look upon non-entries as so odious, that he observed the Lords took all courses to abridge them, and he affirms that *succidenda sunt ejus putamina ex senatu.* Now, in the Chancellor's case there is neither *culpa* nor *contemptus*, because he has no second son to enter; *ergo*, there is no non-entry here. Yet *quod in favorem alicujus introductum est, non est in illius dispendium detorquendum; ergo*, since it is not the Chancellor's fault that he wants a second son, his wanting one should not deprive him of the maills and duties *medio tempore*, during the pendency and possi-

bility. In this case there could be no special declarator of non-entry; because there was none they could call or interpel as defenders *ad sustinendam personam rei*, (as in decreets *cognitionis causa* is done:) not the Chancellor's second son, because he was not *in rerum natura;* not David Melvill or his father, because they were not *veri contradictores*, their right being as yet suspended. One has writ a tract *De vero contradictore.*

On the 1st of August, at the Exchequer, the maills and duties of Levin were given by the King's letter of administration as *pater patriæ*, to David Melvill and his heirs, as *bona vacantia et nullius;* and makes him *curator bonis*, to defray the debt, for the use and behoof of the possible heir, and as his fidei-commissary. It did not bear given under any seal, and it was queried what seals it should pass. It being the first gift of that kind, the Exchequer may supply the defect, and ordain it to pass what seals they please. Presentations of archbishops and bishops pass all the seals. Presentations to other beneficed persons pass only the Privy seal. Patents to noblemen go, *per saltum*, to the Great Seal. See Hope's Minor Practicks, *Titulo, Of Signators.* They say, the Lords this session found, that the bedell of the chapel-royal's gift needed not pass any seals, that having been objected against it as a defect and informality.

On occasion of this tailyie of Levin, a hundred pretty cases may be raised. What if it had been failyieing heirs of a woman's body? When must that be understood to fail? If at 50 years, or later? If one be substituted, failyieing of children of such a man, and that man turns a monk and enters into a cloister, *an fit locus substituto, an vero amplius expectandum*, since he is *civiliter mortuus?* Yet he may recant and marry, and the arms of our church should ever be open to receive all who return. In the case of *Stormont's* tailyie and *my Lord Annandale's* creditors, discharging to contract debt under an irritancy of devolution to the next heir. What if a moderate sum be contracted for ransoming and paying a λυτρον for his father or brother from captivity? *Licebat jure Romano, pro redemptione captivorum, alienare etiam vasa sacra et ecclesiastica; ergo*, much more here. See anent ransoming relations, a case in the English time, 1657.

A clause of tailyie of lands to a man, his heirs-male and assignees, without more, (as was in *my Lord Ramsaye's* disposition of the *Scars* to *Abbotshall*,) may occasion a caducity if he want sons, and be surprised with death before he dispone; as was in the *last Earl of Dundie's* case, which made the King and Halton his heir; so that, failyieing of heirs-male, it is fit and necessary ever to provide the lands to the heirs whatsoever.

In a disposition by a father to his eldest son, with the burden of all his debts, both those contracted before the son's fee, (*quod inest de jure*, it making a passive title,) or after the fee; to secure it and make it effectual, it may be conceived with an obligement that they or any that shall succeed in that estate shall within five years (for a *laxamentum temporis* would, in equity, be given,) after the delation and devolution, enter heir, whereby they may be liable for all the debts; and in case they do not, then to bear an irritancy, that the estate and lands shall devolve and fall to the next in blood or next substitute, he entering heir (but he cannot enter heir, there being a nearer existent, though in the Roman law they might, *Tit. C. de Successorio Edicto, et de Repudianda bonorum possessione, ibique* Cujacius; yea, in Melvill's case, the Lords found his son could not enter heir so long as there was

a nearer possible;) within the same space, or rather, he giving his own personal bonds and engagements to the creditors for their debts. See sundry excellent clauses of tailyies in a Style-book beside me. *Vide* Cujacium, *in Paratitlo ad Tit. Cod. Qui admitti ad bonorum possessionem,* where he shews, *Quod testator aditioni diem prestituere potest.*

Some superiors, when they give charters to their vassals, (particularly Argyle, &c.) they make themselves heirs of tailyie to their vassals in the third or fourth place, degree, and order of substitution; by which oft they fall to succeed in the property. But the vassals may alter it by a second bond of tailyie, or by granting a bond, whereon the lands may be apprised from them.

Supra, at No. 548, in Melvill and the Chancellor's case, I have remarked a very loyal clause was in the former Dukes of Hamilton their charters. Now I am informed, that in the charter of this Duke and of some other great persons, (which was also craved in passing Dom. Pedro Frazer, charter of Dores, on his father's disposition and resignation to him, but was refused by Dundonald; see the disposition and charter *apud me*;) there is a very different clause, viz. that in case any of them commit treason, they shall not forefault their lands, but shall descend and go to the next heir. This is *pessimi exempli,* and disadvantageous, and reflecting both on the honour, profit, and credit of the Crown.

See a large summary of Sir Alexander Frazer's disposition to his son, extracted by me in the beginning of November 1677.

Advocates' MS. No. 614, *folio* 294.

1677. *July* 25. ANENT PRESCRIPTION OF MERCHANT ACCOUNTS.

QUÆREBATUR,—If the act ordaining merchant counts to prescribe within three years, *quoad modum probandi,* militates against strangers, who are not tied by our law, and know not such as are *juris mere positivi.* Yet it was alleged, that it did prescribe even to them, where the subject matter contraverted was Scots goods, for then *actor sequitur et forum rei* and the laws of his country.

Advocates' MS. No. 618, *folio* 295.

1677. *July* 25. The COUNTESS of TRAQUAIRE *against* The EARL of SOUTHESK.

THE long debate between the Countess of Traquaire and the Earl of Southesk was decided this day. The Lords found the arbitriment to the Archbishop of Glasgow, Earl of Queinsberry, &c. not of an ordinary nature, in regard of these words, "They always having regard to the standing of the family;" and therefore sustained the decreet-arbitral. They found the irredeemable right was affected with a back-bond, and therefore appointed Southesk to count and reckon, &c.

Advocates' MS. No. 619, *folio* 296.