

Now I see no material difference betwixt our case and that of Sir Jo. Brown's daughter. And how thir decisions stand, I apprehend not: for I put no doubt but Barbara Home, after her husband's decease without any heirs, might have sold it in her own lifetime; and if her son behoved to be served heir of provision to his stepfather, Wilkieson, then a creditor might have comprised it from Wilkieson; which would frustrate the tailyie.

In this same case, there was another question that arose from the conception of this infeftment, which was the termination on Barbara Home's heirs, and not on Barbara herself; which I conceived induced my Lord Stair to that decision; but really he might have given the Lords' answer on the conception of the infeftment, his opinion being contrary to Craig's, and seemingly contrary to the Lords' decisions in a case not unlike unto this. In this same contract, as this tenement was tailyied to the wife and her heirs, so by a clause subsequent, all lands, heritages, &c. to be conquest during the marriage were siclike provided: which, because there followed no infeftment on it, the Lords found furnished him only an action; and that the copulative particle, "and siclike," subjoined to the clause of tailyie immediately preceding, subjected that clause of the conquest to that same sense and interpretation.

The subject of tailyies I intend, God willing, to handle apart, for my own satisfaction.

*Act.* Birnie. *Alt.* Dinmuire. Mr. Alexander Gibson, *Clerk.*

*Advocates' MS. folio 58.*

---

1670. *January 1.* CRANSTON *against* SOMERVELL.

A decret of removing being obtained by Thomas Cranston against Wilkieson, and being suspended on obedience, there was compearance made by one who was infeft long before, and whose right had been preferred in an action of maills and duties; and so contended, that as he was preferred in the maills and duties, so he had good interest to allege, in this suspension, why he ought not to suffer that tenant to remove, to the effect Cranston might get possession of the land, both being *in acquirenda possessione*.

The Lords found, notwithstanding of the diligence used by Cranston, who had used an order of warning against this tenant, and that the other had neglected it, yet that he ought to be admitted to debate upon his right with Cranston, so far as might be done in a possessory judgment. And because the seasine produced by Somervell, the other party, did not meet; therefore they preferred Cranston to the possession.

*Act.* Dinmuire. *Alt.* Birnie.

*Advocates' MS. folio 61.*