

1670. *June 24.* WAIT *against* CAMPBELL of KILPOINT.

IN a pursuit at Wait's instance, against the said Mr Archibald, as representing his father, who was cautioner for the Laird of Lawers for £1000, upon this passive title;—That, after the contracting of the debt, his father, by contract of marriage with Thomas Moodie's daughter, did become obliged to pay to the said Thomas, for his son's behoof, the sum of £40,000, for which the said Thomas was obliged to pay £20,000 in name of tocher; of both which sums the father and the son did grant receipt and discharge to the said Thomas Moodie, but did not bear which of them received the money:

The Lords did not sustain that he was successor *titulo lucrativo*, as for the 20,000 merks paid in tocher; neither that that sum was liable to the father's creditors: But as to the £40,000, they found him liable; and that it might be affected by his father's prior creditors.

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1670. *June 24.* MR WILLIAM ROBERTSON *against* CAMPBELL of KILPOINT.

THE said Mr Archibald Campbell being pursued at Robertson's instance, as cautioner, in a contract of wadset, for the Master of Gray, for 50,000 merks, in case of requisition; in which wadset there was a clause,—that if he should continue in possession of the lands, that the principal and cautioner should be free of annualrent: the said Mr William having desisted to possess, and suffered the Laird of Philorth to enter into the possession, who had required a right of reversion, did pursue for the principal sum due by the requisition, and for five years' annualrent, that he had been out of the possession:

It was ALLEGED, That the pursuer having continued in possession after the requisition, and thereafter having desisted, without any decreet gotten against him at Philorth's instance, he could not pursue for payment.

It was REPLIED, That, by the foresaid clause of wadset, it was in the pursuer's option to possess or not possess, as he pleased; so that he might desist, and seek the annualrent of his money.

The Lords did sustain the pursuit for the principal sum and annualrent in time coming; the pursuer denuding himself of the right of wadset, in favour of the defender, who was only cautioner. But as to the years that he had suffered Philorth to possess, the defender was assoilyied; seeing he had never used an order of redemption, but had possessed, by the pursuer's tolerance or right.

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1670. *June 28.* THE LAIRD of NIDRIE and MR CHARLES LUMISDEN *against* MURRAY.

THERE being a decreet of removing obtained against Murray, he gave in a