

1698. *November 18.* ENSIGN LIVISTON and CHARLES GRAY *against* MACGIE of SLOGARIE.

ARBRUCHEL reported Ensign Liviston and Charles Gray, merchant in Edinburgh, against Macgie of Slogarie. Hay, younger of Linplum, having in a sudden quarrel killed Captain Liviston at Glasgow, in May 1696, the magistrates secured the Captain's goods upon inventory; but he having been married to Macgie of Slogarie's daughter, the father-in-law intromitted with the whole goods without any authority, and disposed thereupon. His brother, and Charles Gray, as executor-creditor confirmed to him, pursue Slogarie for vitious intromission.

ALLEGED,—He had a probable title to intromit, because it was believed his daughter was with child, and so it was reasonable to secure the Captain's effects for the use of his lady and child; and seeing it proved otherwise, he was willing to restore such of the goods as are extant in specie; but he cannot be liable for the value of these which are either deteriorated, as his wearing clothes, &c. or dead since, as his horses, &c. seeing that has happened without any fault of his, and he being only *debitor specierum, res perit suo domino*.

ANSWERED,—His intromission was predoneous and unwarrantable, seeing his daughter was but four months married to the Captain; and if there had been any expectation of her being with child, he should have applied to the magistrates, and intromitted by their authority.

The Lords found this intromission not necessary; and therefore found him liable for the price of such goods as shall be proven he meddled with and does not offer to restore in as good case as they were at the Captain's death.

Vol. II. Page 15.

1698. *November 19.* GEORGE DENNISTON *against* JOHN CHEISLY.

GEORGE Denniston, writer in Edinburgh, having exhibited a complaint against John Cheisly, Writer to the Signet, that in a printed petition he had injuriously defamed him, by charging him with a cheat and villany, as rescuing one Scot out of the messenger's hands, and saying it was his usual practice; and now, after probation, it is found, there was no caption there at the time, and so he could not be legally detained; therefore the Lords fined the said John in 1000 merks to the poor's box, and ordained him to crave Mr Denniston pardon, and sent him to prison till he paid it. The *palinodia* and retraction is little worth, being frowardly done for the most part.

Vol. II. Page 16.

1698. *November 25.* JAMES ARCHIBALD *against* THOMSON.

PHEUDO reported James Archibald, portioner of Balbrekie, against Thomson. Having married two sisters, heirs-portioners, they divided the lands equally; but James Archibald having a latent infetment of annualrent, which he had

long before this agreement acquired, he disposes it to his son, who, pursuing a poinding of the ground against Thomson's half, he raises a reduction and declarator that the same is extinct, or must accresce to him, being in Archibald's person at the time of the transaction.

ANSWERED,—Offers to prove, by the comuners and witnesses, that it was neither *actum* nor *tractatum* to be conveyed.

REPLIED,—It was unknown to him, and concealed by his good-brother, and so could not be the subject of a communing.

The Lords considered there was evident fraud in keeping up this right; and when Archibald disposed the property of the half to Thomson, that carried the lesser right and servitude of the annualrent, as has been oft decided; *in majore continetur jus minus*; therefore they ordained him to communicate the right, seeing *jus authoris accrescit successori*.
Vol. II. Page 19.

1698. December 6. HENRY NISBET, YOUNGER of DEAN, against JOHN KINNAIRD.

[See the prior part of the Report of this case, Dictionary, page 4872.]

IN the action, mentioned 25th November 1698, between the L. of Dean and Kinnaird; the attempted settlement not taking effect, the Lords advised the cause *in jure*, and found the reasons of circumvention and fraud, both *in consilio et eventu*, not sufficient to reduce the tack; and that the tenant should have informed himself better what was the true rent, and not have relied on Dean's assertion, and tried the quality of the ground; and his eye being his merchant, he had none to blame but himself; and he had acquiesced two years. But as to the damages by not removing the stones, and not making the ponds, the Lords allowed a probation, before answer, to both parties, on their several allegances.
Vol. II. Page 23.

1698. December 6. RATTRAYS against JOHN DRUMMOND of NEWTON.

CHALMERS, elder and younger of Milnehorn, sell their lands to one Crighton; and the price being a sum secured by a wadset on the Earl of Strathmore's estate, they take their right to it in John Drummond's name as their trustee. Their Rattrays being creditors to Chalmers, the father, arrest in John Drummond's hands; and, in the pursuit to make forthcoming, he depones he was only a confident and interposed person, and had applied the price for payment of debts wherein Chalmers of Milnehorn, younger, was bound as cautioner for his father.

ALLEGED,---This was an unlawful gratification, preferring one creditor to another; and that, after their arrestment, he should not have paid, but suspended on double poinding.

ANSWERED,—This falls not under the Act of Parliament 1621; for the son, whose trustee he was, being in the fee of the lands, as he had validly disposed, so the trustee might warrantably apply the price towards the payment of his