1662. *June.* WILLIAM BAILLIE *against* The HEIR and EXECUTOR of JOHN JAMISON.

BY a minute of contract, betwixt William Baillie and umquhile John Jamison, William is obliged to dispone a tenement of land to the said John, his heirs and assignees; for which, John obliged himself, his heirs and executors, to pay to William 3300 merks. The said William pursues the relict as executrix, and the heir of the said umquhile John, for payment of the price. It was alleged by the relict, That she and her child, the heir, were willing to pay the money upon a disposition of the land to her in liferent, and to the heir in fee; and the reason why she should be liferenter is, that the price being the greatest part of her husband's estate, and lying moveable by him, she would have had the third part thereof as relict, if her husband had not been obliged to pay the same as the price of the lands: her liferent thereof is scarce a recompense for loss of her third. It was answered, That the allegeance is not relevant *hoc loco*, but she may *agere* against the heir. The Lords found the allegeance not relevant *hoc loco*, and inclined to think, that, if she were pursuing the heir, she should only have a terce of the land, just as if her husband had been infeft therein.

No. 42, *Page* 31.

1662. *July.* The MASTER of GRAY *against* STEPHEN BRUNTFIELD.

ROBERT Stewart, provost of Linlithgow, *in anno* 1624, gives bond to Alexander Glen for £151, which was assigned to umquhile William Gray, merchant; and transferred by the Master of Gray, as his executor, to Stephen Bruntfield; who having pursued Robert before the English Judges, there was a defence proponed, *viz.* That Alexander Glen, the creditor, being debtor to umquhile Alexander Reid, goldsmith, the said Alexander Reid did arrest the said sum in the hands of the said Robert Stewart, and thereupon recovered sentence against him, the said Alexander Glen being called, and that long before the assignation made to the said umquhile William Gray, at least after the intimation; which defence was found relevant. And now the said Stephen Bruntfield raises a review, and alleges, He got wrong by sustaining the foresaid defence, and not being relevant, unless the defender had also alleged payment; and that sentence being obtained against the said Robert Stewart, he ought to have suspended upon double poinding. It was answered, That the defence was justly found relevant, and the English Judges did no wrong; because, Glen being clearly denuded by the said sentence recovered against him, at the instance of Reid, and the defender constituted debtor thereby, it clearly excludes any posterior right made by Glen; especially considering, that now, after so long time, the defender has truly lost his discharge granted to him by Reid; and so it were most unjust he should be troubled by a party who has no right: and though, oftentimes, sentences prior and posterior, or assignations, are all suspended by the debtor against whom the same are recovered; yet, where the sentence is not only recovered against the party in whose hands the sum is arrested, but also against the debtor, for his interest, there is, in this case, no necessity of a

double poinding against a person having right from the debtor *post sententiam*. The Lords sutained the decreet, and found, that the defence was not unjustly sustained.

No. 48, *Page* 35.

1662. *July.* JAMES LOCKHART *against* ALEXANDER KENNEDY.

IN a removing, pursued at the instance of Alexander Kennedy against his tenants, compeared James Lockhart; who alleged, There can be no process upon the pursuer's infeftment, because, it being a seasine of lands within the town of Air, it ought to have been given by one of the bailies and town-clerk; whereas it is given by the Sheriff and Sheriff-clerk, by a commission from the English Judges, who had no power. 2. It is given by a precept of *clare constat*, whereas it should have been given upon a retour, or upon a cognition of sworn neighbours. It was answered, That, the time of this infeftment, there was no magistracy in Air, nor bailies, in regard they refused the tender, and consequently the Judges might very well commissionate the Sheriffs. And as to the 2d, it was answered, That as the bailies might have entered an apparent heir by hasp and staple, without service or cognition, so as well by a precept of *clare constat*. The Lords repelled the allegeances.

No. 51, *Page* 36.

1662. *July.* THOMAS LEITCHFIELD *against* CHARLES POTT.

THOMAS Leitchfield, Englishman, pursues Charles Pott, in Kelso, for £47 sterling, as the price of two hogsheads of canary and two hogsheads of French wine, sent by the said Thomas to him, conform to his two missive letters to the pursuer for that effect. It was alleged, Absolvitor, Because the first missive letter directed the pursuer to send the best canary and best French wine; whereas it was offered to be proven, That the canary was most insufficient, spoiled malaga; and the French wine was old spoiled claret; and that the defender did write to the pursuer of the insufficiency thereof, and desired them to be taken back by him. It was answered, That the defender should have, immediately after his receipt thereof, sent and intimated the same to the pursuer, and required him, by way of instrument, to receive the same under protestation; whereas, on the contrary, he did, notwithstanding of his letter sent to the pursuer, sell and dispose thereupon; and, after the receipt of the wine, he, by his second letter, desired the pursuer to send him more. It was replied, There was no necessity of a notary and instrument: seeing, by the first letter, he desired the pursuer to send him special good wine; and by the other letter he told him of the insufficiency of the first: and though, by a second letter, he did write for more, that letter was sent within a few days after the first wine came; at which time, being troubled with the carriage, it was not ready to pierce; nor could it be known whether it had been good or bad wine, till after many months that the pursuer had refused to take away the wine. Neither did the defender dispose