1706. *February* 26. SIR ANDREW RAMSAY of ABBOTSHALL *against* MILLER in KIRKALDY, and OTHERS.

MILLER becoming caution to Sir Andrew in a bond of £400, due by Thomas Young, his miller, to him, and being charged thereon, suspends, that, by the 7th Act 1695, he is free, because not pursued within seven years. ANSWERED, —Sir Andrew was minor a part of this time. REPLIED,—In thir short prescriptions minority neither stops nor is interrupted, unless it be expressed in the Act. DUPLIED,—Minority is an exception in the common law, and takes always place, unless it be excluded, as it is not here; *et inest de jure*, except it be discharged.

The Lords, considering the statute was new, and this a neat precise point in law, they continued the decision of it till June next. *Vol. II. Page* 332.

1706. *February* 1 *and* 27. SIR JOHN HAY of ALDERSTON *against* the LADY CARDROSS and the EARL of BUCHAN.

February 1.—I REPORTED Sir John Hay of Alderston against the Lady Cardross and the Earl of Buchan. Sir Lewis Stewart of Kirkhill, *in anno* 1652, grants a bond to Mr John Stewart of Kettleston, his second son, for 12,000 merks of principal sum, and likewise for 3000 merks of yearly annuity during his lifetime. In 1670, Mr John assigns this bond to Sir George Mackenzie; and he raises a process against Sir William Stewart, as representing the granter, for payment: which being called in 1672, Sir William proponed improbation against the bond, as false, and insisted on the articles both direct and indirect. But, after a long trial, the Lords sustained the bond, assoilyied from the improbation, and decerned for payment. Sir George Mackenzie assigns this debt and decreet following thereon to Mr Thomas Hay, one of the Clerks of Session; and Sir John Hay, as executor to him, raises a new process against my Lady Cardross, as heir to Sir William, her brother, for payment:

For whom it was ALLEGED,—1*mo*, *Absolvitor quoad* the 3000 merks of current annuity, and the annualrents of the 12,000 merks; because, Sir William being donatar to Kettleston's liferent-escheat, these fall under the gift, whereon there is likewise a declarator obtained.

ANSWERED,—This ought to be repelled; because Kettleston was denuded of the debt by an assignation in favour of Sir George Mackenzie, duly intimated long before the gift and declarator, and that for an onerous cause anterior to the horning and rebellion; and so it could not fall under his liferent-escheat, nor belong to the donatar, but only to his assignee.

REPLIED,—That, though there be a *jus quæsitum fisco et domino regi* by the denunciation, yet such is the benignity of our law, and its favour to creditors, that, wherever they affect the subject of escheat goods, by a legal diligence of poinding and arrestment prior to the gift, though posterior to the rebellion, all our decisions have preferred the creditor so using diligence to the donatar: But where it is by a voluntary conveyance from the rebel himself, though for an anterior onerous cause, our law has not favoured these voluntary assignees, but, in a competition, preferred the donatar to them. And, by the 145th Act, Par-

liament 1592, the power of rebels in granting assignations to their creditors is limited and restrained.

DUPLIED,—This were a severe extension of an odious casualty of escheat, to make a denunciation (which is but a civil outlawry) to have the effect of an intercommuning; and to put the rebel's moveables *extra commercium*, making his goods immediately accresce to the King. This were such an inconvenient interruption of the currency of trade as would put all in confusion. And this civil rebellion will have effects enough without this: it makes annualrents due; takes from him his person of standing in judgment; subjects himself to caption, and his goods to poinding and arrestment. And, on the *10th of February* 1635, *Mosman*, one being pursued by a donatar for some escheat goods, and founding on delivery of the goods for payment of a debt before the gift, and he replying that it was after the denunciation, the Lords assoilyied them from the donatar's claim. And though, on the *2d of February* 1632, *Lindsay*, the Lords rejected an assignation, because after the horning; yet it was on this specialty, that it had no antecedent onerous cause. And though, in that famous case between *Veitch and Pallat*, *10th December* 1673, and *9th February* 1675, the Lords once found the donatar preferable to an assignee posterior to the rebellion, but prior to the gift, and depending on an onerous cause *ab ante*; yet there they found, where the prior bond was innovated and passed from by taking a new security, or where payment was made before the gift, that in either of these cases the voluntary assignee was preferable to the donatar. So here, by a litiscontestation and sentence obtained by Sir George Mackenzie against Sir William Stewart of Kirkhill, there was a judicial novation; and by his not payment he ought to reap no benefit, but the case put as if he had paid; and then there rested no pretext for the donatar to claim preference,—*l.* 86 *and* 87, *D. de Reg. Jur. Non solet deterior conditio fieri eorum qui litem contestati sunt, sed potius melior.*

In the *second* place, It was OBJECTED against this gift of escheat,—That it was passed contrary to the rules and acts of Exchequer in 1662, &c. discharging any such gifts to be expede without a backbond, as *contra jus et utilitatem publicam*, and prejudicial to creditors. And was so found by the Lords, *22d February* 1672, *Lord Halton* against *Ayton*, and marked both by Stair and Dirleton. ANSWERED,—Backbonds, though convenient, are no essential concomitant of a gift; and lords of regality gifting their casualties require none. And here the King dispensed with it, because of the many suspicions loading this debt now pursued for.

3tio, It was OBJECTED,—That the horning on which the gift proceeded was null, because it did not bear the designation of the rebel's dwelling-house at which he was charged. ANSWERED,—There is no law requiring the same; and he being designed by his style of Kettleston, that is presumed to have been his domicile. And it is yet entire to condescend where it was, seeing the Act of Parliament, 1681, declares such designations, when omitted, to be unsuppliable in time coming; which allows a condescendence as to all cases before that act. REPLIED,—The 75th act 1540 seems to require the mentioning the dwelling-house; and Durie observes, *14th July* 1626, *Adam*, that a horning was found null for want of designing the dwelling-house. Yet Durie, on the *9th November* 1632, *Montgomery*, and President Newton, *12th February* 1684, seem to allow the dwelling-house to be yet designed.

There was a separate defence (besides this of the gift of escheat) proponed for

the Lady Cardross on retention, That her father was cautioner to Sir John Nisbet of Dirleton for Mr J. Stewart of Kettleston, his brother, in £10,000 Scots, and whereof she is not yet relieved.

ANSWERED,—1*mo*, No distress, *ergo* no retention. 2*do*, Not competent against the pursuer, who is a singular successor; however it might have met Kettleston the cedent. 3*tio*, It was competent and omitted, in the decreet for payment obtained by Sir George Mackenzie against her brother, and so not proponable now. Likeas, Dirleton, *voce* Compensation and Retention, thinks them not receivable in this case.

REPLIED to the *first*,—Distress shall be instructed; and, *esto* it were not, *frustra petis quod mox es restituturus*. 2*do*, She and her brother were but the heirs of the cautioner, and might be probably ignorant of this debt; and *noviter veniens ad notitiam* is always received. 3*tio*, Though that decreet bears a conclusion and decerniture of payment, yet that is not so much as craved in all the four neuks of it; but the whole debate goes on the articles of the improbation, *et judex nunquam impertit officium nisi rogatus*. As to the points of falsehood then insisted on, see some of them marked in the decision, 7*th February* 1672, *Kettleston*.

The Lords found such variety of points in this debate, and that it dipped on the extent of gifts of escheat, how far they might be preferable to creditors, which is of very dangerous consequence, and yet, in some cases, may be favourable; therefore they declared they would hear the cause in their own presence on the 5th of June next. *Vol. II. Page* 321.

February 27.—In the action mentioned 1st current, Sir John Hay of Alderston against the Lady Cardross, there was a bill given in by the Lady, bearing, she had raised a new reduction and improbation of Kettleston's bond; and had ground to believe it was but a copy made by Mr Patrick Falconer, keeper of the minute-book; and that he had long deponed so, but his oath was abstracted and amissing. Therefore craved he might be reëxamined on his knowledge of the making up of this bond, wherein he was made an innocent tool.

ANSWERED,—1*mo*, No such examination could be taken, to lie *in retentis*; seeing the process was neither seen nor returned. 2*do*, It was *lis finita et judicata* by a former decreet. 3*tio*, The principal bond was not in the field, without seeing of which he could not depone. Likeas, he behoved to get up his former deposition; neither is he valetudinary, that he needs to be instantly examined; and, at best, he would only be a single witness.

The Lords refused to examine him in this state of the process.

Vol. II. Page 332.

1706. *June* 8. JOHN BUCHANAN *against* WILLIAM WRIGHT of FASKIN.

MR John Buchanan, writer in Edinburgh, pursues Mr William Wright of Faskin, doctor of medicine, for 700 merks owing him by Mr James Wright of Kerse, the defender's brother, whom he represents, for disbursements of law, and his pains, in defending him against John Callander's gift of recognition of Craigforth; and, having no written instruction for the debt, he refers the libel and