

1715. *February 1.* GRAHAM of Benchils *against* BLAIR of Inchyra.

BENCHILS being habit and repute a weak person, though not altogether fatuous, grants a disposition of his lands, which were worth about 800 merks yearly, &c. in anno 1706, in favours of Inchyra, his brother-in-law: which disposition proceeds upon a narrative of money received; which, with 2000 merks, to be paid, not to the granter, but to Sir James Ramsay of Bamff, and 6000 merks payable to his own and his wife's friends, for which Inchyra gave bonds, but containing irritances, in case the disposition did not subsist, and with reservation of the granter and his wife's liferent,—is declared to be the adequate price of the lands, containing also absolute warrandice. Thereafter, in January, 1707, and after the decease of Benchils' lady, there is a contract entered into betwixt them, wherein Benchils disposes to Inchyra all his debts, sums, &c. that did then or should thereafter belong to him, with the rents of his lands; and Inchyra binds to aliment him, and clothe him, but only out of his lady's thrift, &c. and to relieve him of his debts, not exceeding 2000 merks, and to pay him 200 merks yearly. And in February thereafter, Benchils renounces in Inchyra's favours his liferent formerly reserved.

The Lords, before answer, having allowed a conjunct probation of the facts and qualifications alleged for either party; and many witnesses being thereupon examined:

The Lords reduced the disposition made by the pursuer to the defender, in December, 1706, with the contract betwixt them in January, 1707, and the assignation, disposition, and renunciation of the pursuer's liferent to the defender in February thereafter; and decerned the same to be void and null.

But, upon a reclaiming bill and answers, the matter was delayed till June.
Act. Graham. Alt. Lord Advocate. Mackenzie, Clerk. Vol. I. page 64.

1715. *February 3.* THOMAS HENDERSON, Writer in Edinburgh, *against* The MAGISTRATES of JEDBURGH.

A merchant in Jedburgh being apprehended there, at the instance of James Hamilton merchant in Dunbar, for L58 Scots, in anno 1679; and Robert Ainsly, then bailie, being charged to incarcerate him, did it accordingly, but thereafter set him at liberty: Upon which a subsidiary action being insisted in against Ainsly, and the then magistrates, there was a decret obtained before the Lords in 1680, decerning also for L80 of expenses and damages; which decret is by progress now in the person of Thomas Henderson, Writer in Edinburgh, who now insists in a process against the present magistrates, for payment of the sums decerned for in that decret. In which action,

It was for the defenders ALLEGED,—That the present magistrates were not cited, though the former were; and since the action was not insisted in during their office, the citation was of no effect; First, As to them, because now they have no concern in the town, being *functi*: nor are the present magistrates oblig-

ed to answer, as not being called. And since they are the only administrators and proper defenders of the town's commonty, being in office, they ought to be cited before any process can be insisted in against the town.

ANSWERED for the pursuer, That the Magistrates who were in office when the summons was raised, being duly cited, they who pursue corporations are not bound to renew their citations upon every change of the Magistrates or governors: for the citation is against the community, and only against the Magistrates for the time, as representing such communities.

The Lords reponed the Magistrates to their defences, and turned the decret to a libel.

Act. M. Lumsden. Alt. W. Scot. Sir James Justice, Clerk. Vol. I. page 67.

1715. *February 16.* MRS AGNES NICOLSON, *against* SIR JAMES SHARP of Stoniehill.

THE deceased Sir William Sharp of Stoniehill, grand-uncle to the said Sir James, having married a lady, with whom he got a considerable portion, and having no children, grants bond to her for L10,000 Scots, payable and bearing interest after his decease; and thereafter grants a disposition to several debts resting to him, constituted by bonds, tickets, accounts, &c. in favours of Sir William Sharp of Scotsraig his nephew, and father to Sir James: Which disposition bears this narrative, That his nephew stood bound for him in several considerable debts. After old Sir William's decease, his nephew did not represent him; but paid many of his debts, taking assignation thereto in name of George Howat his trustee, who thereupon leads an adjudication on old Sir William's estate. And Agnes Nicolson, the old lady's niece and assignee, did also within year and day, lead an adjudication upon the above-mentioned bond, and now insists in a process of mails and duties. Wherein compearance being made for Sir James Sharp, son to Sir William the younger, he produces for his title the said adjudication: and craves preference, because Howat's adjudication was led for true debts and bonds of borrowed money; whereas Agnes Nicolson's adjudication is a gratuity, which ought to be postponed to onerous debts.

ANSWERED for Mrs. Nicolson,—That she only craved to be admitted *pari passu* with Howat's adjudication; and that Sir James could not object against her debt, because old Sir William had left sufficient means to pay all his debts, and this bond also in favours of his lady. And further, that young Sir William had accepted the said disposition, to a vast sum more worth than all the heritage; so that it was presumeable he had bought in his uncle's debts with the effects of the disposition.

REPLIED for Sir James,—That the naked acceptance of the disposition could never import extinction of his adjudication, in regard it was only a right in further security, nowise innovating the constitution of the debt secured; and Sir James and his father were under no obligation to use diligence, either implicitly from the nature of the right, or expressly from the tenor thereof: and therefore Mrs. Nicol-