

passu for the remnant: but if Drum would not possess, then they preferred Gairden, he paying Drum his expenses out of the first end of his intromission.
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1682. *Nov. 29.* EUPHAME SETON, Lady Kirklands, *against* THOMAS BUTTER.

EUPHAME Seton, Lady Kirklands' action against Thomas Butter, tutor to her son, and executor to her husband, being reported by Castlehill; the Lords preferred the relict pursuer to her husband's creditors, not only *quoad* the funeral expenses, which is uncontroverted in law; but also for her mournings, he being of that rank and quality that his wife might wear them. *2do*, For the servant's fees. *3tio*, For the entertaining the family to the next term after his death; and *4to*, For the expenses of her in-lying of a posthumous child, though the same fell to be after the term immediately subsequent to his decease, and so fell when she was entered to her own jointure.

Which last they had decided before, in 1675, in Agnes Wilkie's case against Morison; but *quær.* if under this she may claim the expense of the child's nurse's fee. And the Lords having remitted to Castlehill the auditor to consider the accounts given in by the relict, and to modify the same as he saw just; upon his report they modified to her 900 merks; she allowing, in the first end of it, what provisions she had in the house at the time of her husband's death, and any victual she received either then or since, providing it was not in payment of her jointure; and they found both the aliment to the term due, and that term due for her jointure, seeing she might lose a term by her dying before Whitsunday or Martinmas.

I find the Lords have allowed relicts' mournings even where the husband has died *obæratu*s with more debt than their estate could pay; as in the case of Lady Kincardine and Lady Boggie.
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1682. *November 29.* SIR ANDREW DICK *against* ROBERT DEANS.

THIS was an advocacy from the Commissaries of Edinburgh, where Sir Andrew pursued Mr Robert Deans for slandering him, and stealing away and murdering his good name and reputation, by calling him a *belted*, *i. e.* in one sense, a whipped knight, for stealing some Scots records out of the Tower of London, the time of Oliver Cromwell's usurpation. Mr Robert's reasons of advocacy were: *1mo*, He was a member of the Session; *2do*, the Commissaries had committed iniquity in sustaining process, after he had debarred Sir Andrew Dick with horning.

ANSWERED,—The first was a declinator; and was not competent now, after he had proponed peremptors. *Item*, The privilege of advocates was only in civil cases, but not in slanders, where the Commissaries, as *judices Christianitatis*, were only competent *in prima instantia privativè* of the Lords aye till they had

pronounced sentence, by imposing a fine, and the usual censure of standing at the church door and recanting. To the *second*, The Commissaries did no wrong; for though they repelled Sir Andrew *ab agendo*, yet, *ne delicta maneant impunita*, they sustained process *ad interesse publicum* at their procurator fiscal's instance.

The Lords heard the two parties scold a while upon one another, in their own presence, for their diversion. *Vol. I. Page 197.*

1682. November 30. JOHN LIDDEL *against* LAW.

JOHN Liddel, minister at Scoon, pursues an action against one Law, for £1000 Scots contained in a bond granted by Law, his wife's former husband.

The Lords, on Forret's report, reduced the bond, and found it satisfied, on this inartificial and conjectural probation; *1mo*, That it appeared, by the pursuer's oath, that the cause of the granting it was in lieu, contemplation, and recompense of her moveables and plenishing she brought with her; (though the bond in its narrative did not bear this cause;) and that the husband's children were forced to give her back again all these moveables, and she evicted them from them, because the marriage betwixt that husband and her had dissolved before year and day, without children, and so the bond was *causa data causa non secuta*. *2do*, That the cause of the bond being merely gratuitous, and his whole estate being but 2000 merks, he could not give away £1000 of it to his wife, in prejudice of his children their legitim.

The Lords sustained thir two reasons of reduction; and found them proven, and so on pregnant presumptions took away this bond. *Vide* a similar case, *15th Dec. 1681, Mercer. Vol. I. Page 198.*

1682. CORNELIUS NIELSON *against* JAMES BONNAR'S HEIRS.

January 11.—THE case betwixt Cornelius Nielson, merchant in Edinburgh, and the heirs of James Bonnar, upon the circumvention, was debated, wherein the lawyers expatiated learnedly on *dolus incidens et dolus dans causam contractui*; which being mistaken by some, has made me set down their definitions here.

Joan. Bockelmannus, in his learned *Compendium Institut. tit. De Actionibus*, p. 246, defines *dolum dantem causam contractui, quo quis inducitur ad contrahendum qui alias contracturus non fuisset; dolus vero incidens dicitur, non quo incidit in contractum, sed quo aliquis circa contractus incidentia decipitur; veluti cum vilius vendit et carius emit.*

Struvius, in *Syntagm. Juris*, vol. 1, p. 257, defines them from Cæsar Borgia, de *Dolo*, thus: *Dolum incidentem esse, quando quis omnino, sua sponte, alterius calliditate non inductus, contrahit, et in re de qua initur conventio, (v. g. circa rei valorem, qualitatem, &c.) seu in modo contrahendi, fraudulenter decipi-*