

father in his contract of marriage. ALLEGED,—Posterior to that obligation the father took a bond for 1700 merks to himself in liferent, and you in fee, and which must be ascribed in part of payment of the debt he was then owing you; seeing *debitor non præsumitur donare*. ANSWERED,—That brocard takes not always place, and is elided by stronger presumptions. And here the sum of the contract of marriage was suspended during the father's life; and so this substitution cannot be in implement thereof, because that were to make him pay before the term. This the Lords repelled, because both of them had one term, *viz.* the father's decease.

The *second* qualification was, That, as his father's estate increased, so he augmented his children's portion, and gave the other two more than this son; and, if this be not construed a gift, then he would not get any thing but just what was provided in his contract; and the rest would be more unequally provided than he; and, this being *conjectura de voluntate defuncti*, he lived many years after this; and, if he had designed it for payment, he would have by some writ declared so. The Lords, in this circumstantiate case, found it ought to be esteemed a distinct liberality and donation, and not to be imputed in payment of the preceding debt; but ordained the circumstances to be engrossed in the interlocutor, that it might not enervate the maxim founded on the presumption in other cases.

*Vol. I. Page 654.*

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1694. December 28. STEWART against The TOWN of PAISLEY.

RANKEILER reported the poor woman Stewart against the Town of Paisley. The Lords read the Act of Parliament; and found it was but a private act, and fell under the act *salvo jure*; and, though it gave them the privilege of the royal burrows to cite heritors of decayed tenements, within a year, to rebuild them; and, if they failed, then to appreciate, and either reëdify them, or sell them to such as would: and therefore reponed her to her right; but the purchaser, who, on the faith of that act, had built, would get back his price, and allowance for all his meliorations. Some of the Lords thought she should have been first burdened to prove the two allegeances she founded on:—*Imo.* That the year and day when she was cited could not run against her, because she was then in Londonderry, and, being besieged, it was an insuperable impediment; *2do.* That the Magistrates were *in dolo*, having sold it much cheaper than might have been got for it; and having concealed and kept up 250 merks of the price they received, like Ananias and Sapphira. But the plurality would not put her to that trouble and expense.

*Vol. I. Page 654.*

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1694. December 28. MR JAMES and ALEXANDER LUNDIES against ALEXANDER TROTTER.

THE Lords opened the decret of count and reckoning, upon this nullity, That the decret bore that the term was circumduced against Lundy for not proving the whole sum of the wadset was paid to Trotter's creditors conform to

his obligations; whereas it did not appear from the process that either there was a term assigned, or a circumduction; and so has been a mistake of the clerk's.—Which make some people compare our decreets to Penelope's web,—what she wrought in the day-time she unravelled it all at night. And it is hard to make people suffer for either the Lords' or clerks' mistakes.

*Vol. I. Page 654.*

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1695. *January 1.* BALFOUR and STEWART *against* GEORGE ROBERTSON.

PRESMENNAN reported Balfour and Stewart against George Robertson. One is pursuing the apparent heir for constituting his debt *cognitionis causa*, in order to an adjudication; but the term of payment of the debt is not yet come. A co-creditor, who has already adjudged, competes, and contends that he cannot pursue nor adjudge before the term of payment. ANSWERED,—He only craves it *declaratorio juris*, lest he be cast without the year and day, or even without the ten years of the legal, if the liferentrix live so long, whose death is the term of payment: and in arrestments it has been permitted, though the term of payment be not come,—*29th July 1670, Charters against Neilson*; and *17th July 1678, Pitmedden against Paterson*: and in *John Hall's case against Sir William Sharp*, the Lords sustained his process-declarator even before eviction and distress.

The Lords thought it hard, where the debtor's apparent heir renounced, to suffer a creditor to debar another, though his term of payment was not come, to perfect his diligence on his own peril, adjudications being summary processes; reserving this defence to any competition that may arise in the maills and duties.

*Vol. I. Page 654.*

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1695. *January 3.* JOHN SCOT, Merchant, *against* SIR GEORGE OGILVIE of NEWGRANGE.

MERSINGTON reported John Scot, Merchant, against Sir George Ogilvie of Newgrange. The Lords sustained an inhibition, though it was objected that its execution was on a paper apart, and not on the back of the letters, and did not design him, but referred to the letters: in regard the Act of Parliament 1672 concerns summonses and not diligences; and that here he was sufficiently designed, by his lands lying within the regality of Aberbrothick; unless they would say there was another of the same name whose lands also lay within the said regality.

*Vol. I. Page 655.*

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1695. *January 3.* BARBARA LITTLEJOHN *against* WIER of STONEBYRES.

[See the prior part of this Case, *supra*, page 42.]

THE Lords repelled this allegiance, That a relict kened to a terce of lands