1694, 1695, *and* 1696. Sir John Gordon of Park, and Gordon of Rothemay, *against* Abernethies of Mayen and Isobel Hacket.

1694. *July* 13.—John Gordon of Park, and Gordon of Rothemay, against Abernethies of Mayen, and Isobel Hacket the relict, anent repairing the damage and expense they had been put to by a false and treacherous act of James and Alexander Abernethies, in cutting out of the public registers of the nation the decreet loosing the interdiction on my Lord Salton, by which wicked contrivance they suffered a vast loss; and their guilt and accession thereto was inferred from sundry pregnant qualifications and presumptions.

Alleged,—They were but the representatives and successors of the alleged fraudulent contrivers; and, by the Roman law, *hæres non tenetur ob delictum defuncti, nisi lis fuerat cum eo in ejus vita contestata;* because reason presumes he might have had several defences for purging the crime, which his heirs neither can, nor are obliged to know; even as in vitious intromissions, where it is not constituted against the party in his own life, it is only restricted *quoad* his heir, to an actual intromission, and is not a universal passive title.

Answered,—Even by the Roman law, *in condictione furtiva*, the heir is liable *in quantum ad eum pervenit*, and if he was *locupletior factus;* and this *lucrum* was not restricted to the profit redounding and arising from the delict, but was the advantage they had by their succession to the delinquent; and the distinction of *lis contestata cum defuncto* was a mere subtilty and nicety of that law, which other nations had not admitted. *2do.* It was contended, that the Parliament 1690 refused to sustain process at my Lord Argyle's instance against the heirs of Lord Newton and Forrest, for condemning his father, and refunding his damages; the Parliament thinking it hard to question judges for their opinions in law, though mistaken therein, and much less their heirs after their decease. But the Parliament did not decide this, but only stopped process at Argyle's instance, because he had no title established in his person, as heir or executor, to claim thir damages: though such actions were sustained at Venice, and at the Parliament of England. And *Thomas Robertson's Heirs* were reached in 1687, by a decreet of the Lords, for their father's undermining the walls of a house in the Kirk-heugh, near the Parliament-house, by seeking a foundation to his own houses.

The Lords generally thought it a new and unpathed road to make heirs liable in such cases, and which might be a dangerous preparative; therefore some were for remitting it to the Parliament, as *altioris indaginis*, and above the Lords' jurisdiction; and others proposed, before answer, to take a probation anent all the qualifications of the Abernethies' accession to that false contrivance,—reserving the consideration how far the relict and heir shall be liable to refund and repair the pursuer's damage sustained by that fraudulent cheat. But the plurality carried to determine the relevancy first, ere any probation should be received; and, because it was a momentous point, to hear them further thereupon in their own presence. *Vol. I. Page* 631.

1695. *January* 3.—Rankeiler offering to report that cause, pursued by Sir John Gordon of Park and the Laird of Rothemay against Abernethy of Meyen, mentioned 13th July 1694, how far a delinquency, committed by one who is now dead, and which never was insisted in against himself while in life, can afford

an action for damages against his heir: It was yielded on all hands, that,---as to any pain or punishment, it could not be sustained after the party's death, except only *in crimine perduellionis.* And, on the other hand, it was yielded, that, whatever *pervenit* to the heir by that delinquency, he behoved to refund it; but the question was,—if he could be any further liable. The Roman law required that there should be *lis contestata cum defuncto.* But that was judged a nicety which the equity of our times has repudiated.

The Lords thinking the case singular, where there was no decision either way in our law, and that there was a parallel depending before the Parliament, at the Earl of Argyle's instance, against the judges' heirs who condemned his father, they remitted this case also to the High Court of Parliament.

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1696. *February* 7.—In the action for damages pursued by Gordons of Rothemay and Park against Abernethy of Mayen, mentioned 3d January 1695; Mayen, in a petition, alleging that they were adducing sundry inhabile suspect witnesses to prove the fact, he craved a diligence to cite witnesses to prove his objections against them.

This the Lords demurred on, as not usual in civil causes, but only in criminals, where the diets were peremptory and short; and if they should depone falsely, they had a legal remedy by reprobator, and might protest for the same; but if witnesses were allowed to prove infamy against thir, why might not also witnesses be craved to reprobate their testimonies? which would make a vicious circle.

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1696. *February* 11. ELISABETH SLIT and DICKSON *against* WILLIAM BUNTEIN and JOHN MAXWELL of MIDDLEBY.

ELISABETH Slit, and Dickson her husband, against William Buntein, and John Maxwell of Middleby, agents, upon a summary complaint against them, as members of the Session, that they had taken advantage of them, and caused them enter into a fraudulent and disadvantageous bargain, whereby the said Elisabeth had made over all the benefit of her brother Captain Slit's executry and succession to Middleby, upon his back-bond to pay her the free half of it, he retaining the other half, but defraying all the expenses out of his half; by virtue of which transaction, he craved retention of the half of 7000 merks he owed Captain Slit himself; which Elisabeth and her husband contended was never their meaning, but only to give him the half of what he should recover out of third parties' hands; and that their agreement, (whatever the *cortex verborum* might say,) could never in reason extend to what he had in his own hand, which could stand him no expense in recovery.

ANSWERED,—They could not be ignorant of the sum he was owing; for it is confirmed in the testament, and their own son is cautioner; and they were present at componing the dues; and she has judicially ratified the assignation, and has accepted partial payments homologating the transaction; and, by letters, acknowledged the sense of gratitude they had for all his favours.

REPLIED,—Tacit consent and acknowledgment by homologation is never in-