

long before this agreement acquired, he disposes it to his son, who, pursuing a poinding of the ground against Thomson's half, he raises a reduction and declarator that the same is extinct, or must accresce to him, being in Archibald's person at the time of the transaction.

ANSWERED,—Offers to prove, by the comuners and witnesses, that it was neither *actum* nor *tractatum* to be conveyed.

REPLIED,—It was unknown to him, and concealed by his good-brother, and so could not be the subject of a communing.

The Lords considered there was evident fraud in keeping up this right; and when Archibald disposed the property of the half to Thomson, that carried the lesser right and servitude of the annualrent, as has been oft decided; *in majore continetur jus minus*; therefore they ordained him to communicate the right, seeing *jus auctoris accrescit successori*.
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1698. December 6. HENRY NISBET, YOUNGER of DEAN, against JOHN KINNAIRD.

[See the prior part of the Report of this case, Dictionary, page 4872.]

IN the action, mentioned 25th November 1698, between the L. of Dean and Kinnaird; the attempted settlement not taking effect, the Lords advised the cause *in jure*, and found the reasons of circumvention and fraud, both *in consilio et eventu*, not sufficient to reduce the tack; and that the tenant should have informed himself better what was the true rent, and not have relied on Dean's assertion, and tried the quality of the ground; and his eye being his merchant, he had none to blame but himself; and he had acquiesced two years. But as to the damages by not removing the stones, and not making the ponds, the Lords allowed a probation, before answer, to both parties, on their several allegances.
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1698. December 6. RATTRAYS against JOHN DRUMMOND of NEWTON.

CHALMERS, elder and younger of Milnehorn, sell their lands to one Crighton; and the price being a sum secured by a wadset on the Earl of Strathmore's estate, they take their right to it in John Drummond's name as their trustee. Their Rattrays being creditors to Chalmers, the father, arrest in John Drummond's hands; and, in the pursuit to make forthcoming, he depones he was only a confident and interposed person, and had applied the price for payment of debts wherein Chalmers of Milnehorn, younger, was bound as cautioner for his father.

ALLEGED,---This was an unlawful gratification, preferring one creditor to another; and that, after their arrestment, he should not have paid, but suspended on double poinding.

ANSWERED,—This falls not under the Act of Parliament 1621; for the son, whose trustee he was, being in the fee of the lands, as he had validly disposed, so the trustee might warrantably apply the price towards the payment of his