

1708. *January 8.* The COUNTESS of WIGTON and LADY MARY KENNEDY  
against The EARL of CASSILS and LORD RUGLEN, his Tutor.

IN the ranking of the Creditors of Cassils, the Countess of Wigton and Lady Mary Kennedy craved to be preferred, on this ground, That the old Lady Cassils having, by her testament, nominated the last Earl of Cassils her executor, she burdened him with a legacy of L.500 to each of them : and they having pursued him for exhibiting the testament, for constituting their debts, and referred to his oath, he deponed in the Lady Wigton's process, and acknowledged the legacy : and, in Lady Mary Kennedy's process, he, after sundry commissions taken out to examine him at London, where he was then, suffered the term to be circumduced against him for not deponing ; and so decreet went out : And hereupon both of them adjudged, and so craved preference.

ALLEGED for the present Earl of Cassils, and my Lord Ruglen, his tutor,--- That he must be preferred ; for, before the constitution of your debts, the Earl of Cassils had entered into a contract of marriage betwixt the Lord Kennedy, his son, and an English Lady, whereby the estate of Cassils is conveyed in favours of the heir of the marriage, which I am ; and whereupon a public infestment by a charter under the great seal followed, prior to the pronouncing of your decreet of constitution ; and so, I being publicly infest before ye were so much as found to be creditors to my grandfather, I am clearly preferable, on the 13th Act 1693, preferring real rights by the dates of their seasines.

ANSWERED,---Though the date of their decreets of constitution be after his public infestment, yet their citation upon the summons is two years prior ; and his *mora* in not deponing, nor his entering into articles of contract *pendente lite*, cannot benefit him, nor prejudice them of their just debt : for, where a thing is once rendered litigious, any alienation he makes will not deprive me of the benefit of his oath to constitute my debt ; as was found 20th June 1673, *Somerville*. And, by the 19th act, 1672, introducing a new form of adjudications, a citation is there made a bar to disable the debtor from doing any deed in prejudice of the creditor-citer. Besides, the disposition here is by my debtor to his apparent heir ; and so is a plain *præceptio hæreditatis, et successio titulo lucrativo post contractum debitum*, and can never crave preference to me, but rather, on the contrary, makes them liable *passivè*.

REPLIED,---A naked citation can never put third parties *in mala fide*, unless an inhibition had been raised and executed thereon ; for in what register could the lady's friends who entered into that contract, and gave a considerable portion, find any such depending process ? So his infestment depending upon a most onerous cause, and being first completed, he ought to be preferred : and, in a parallel case, 10th January 1688, *Bothwell*, the Lords sustained a fee given by the father to his eldest son, to exclude an anterior bond of provision made by him in favours of his younger children, as being a latent deed.

DUPLIED,---The contract of marriage is a very good and adequate onerous cause for the jointure and provisions in favours of the Lady, which they do not compete with ; but, *quoad* the destinations to the heirs of the marriage, they can never compete with the lawful creditors. And the decision in *Bothwell's* case was most just ; for there the bond of provision was never delivered, and wanted the dispensing clause.

The Lords found, that the Earl's infesting his son during the dependance of their process could not prejudice them; and therefore preferred the creditors, legatars, to this present Earl's right. *Vol. II. Page 416.*

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1708. *January 13.* PATRICK FLETCHER *against* ALEXANDER REID.

PATRICK Fletcher, factor at Rotterdam, pursues Alexander Reid, merchant in Dundee, for the price of some goods he sent him from Holland.

ALLEGED,---I must have retention and compensation for the price of a parcel of salmon I sent, by your order and commission, in January 1703; and, though they were taken into Dunkirk by a French privateer, yet *unaquæque res perit suo domino*: They were upon your risk, and I must have allowance for them.

ANSWERED,---The hazard must lie upon Reid himself; for you did not observe the terms of my mandate, which was, to send them with that fleet which sailed with the Zeland convoy: but so it is, they came not then, but long after, when the lent-market of fishes was over; it *fnes mandati sunt in terminis custodiendi*. And my letter had an alternative, either salmon or plaiding; and therefore you might have sent the last if you could not get the first.

REPLIED,---I acted for you as I did for myself; for I had a cargo of salmon in the same ship, which was lost as well as yours. And I gave you advice of their coming, which you did not countermand: and, though I had wanted a commission, yet it was *negotium utiliter gestum* upon my part, though, eventually, they were seized; for which the most prudent merchants, acting *bona fide*, cannot be answerable, otherwise all faith should be at an end: and mandates may be fulfilled by equipollents.

The Lords finding he gave no evidence, by bills of loading, that these salmon were shipped for Fletcher, as the proceeds of his goods, nor produced his letter-book to show that he had advertised him thereof, and that it seemed to be a story made up *ex post facto*; they repelled the compensation.

*Vol. II. Page 418.*

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1708. *January 27.* ANNE NAIRN *against* BARCLAY of COLLAIRNY.

By contract of marriage betwixt Sir David Barclay of Collairny and Dame Anne Riddel, he secures her in a jointure out of his lands of Pitblado; and, because the mansion-house on these lands is not sufficiently repaired for her accommodation, therefore he obliges himself and his heirs to build and repair it sufficiently, with the office-houses, for her use during her lifetime. He dies in 1655, and she outlives him for thirty-one years, and dies in 1686, at Newcastle, in Doctor Nairn's house; and, for onerous causes, assigns to Anne Nairn, his daughter, the bygones of her jointure; and particularly that clause of making her jointure-house habitable. Whereupon Anne Nairn raises a process against Barclay, now heir, by progress, to Sir David, to pay her 500 merks yearly during that time, as the house-maill she was forced to pay for the want of it: and, for