

1709. June 10. GEORGE MACKENZIE of INCHCOUTER *against* LORD MOUNT-STEUART.

LORD Cullen as Probationer, in place of Lord Philiphaugh deceased, reported Inchcouter against Lord Mountsteuart. George Mackenzie of Inchcouter pursues the Lord Mountsteuart as heir of line and tailyie to Sir George Mackenzie of Rosehaugh, advocate, for payment of a sum in a wadset.

ALLEGED,—No process against me ; because the Lady Langtoun, the co-heir of line with me, is not called, as she ought to be. ANSWERED,—No necessity of citing her ; for your tailyie is expressly with the burden of all the debts, and so you can never reclaim. REPLIED,—All the heirs-portioners must be brought into the field ; for the other may have defences to exclude the debt which are unknown to me.

The Lords would not cast the process for want of this citation, but sisted process till the co-heir of line were called *incidenter* ; and granted diligence for that effect : and that being done, then allowed the process to go on.

*Vol. II. Page 501.*

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1709. June 10. GARDNER and RIDDELL *against* WILLIAMSON.

LORD Cullen, as Probationer, reported Gardner and Riddell against Williamson. By a contract in the 1702, Riddell sells to Williamson, Brown, and Spiers, sixty-eight dozen of gloves, at ten shillings sterling per dozen, and which are to be sent to Dantzic with the first ship that shall offer ; and they are obliged, conjunctly and severally, to pay the price. The goods never being sent, Williamson pursues Riddell for his damage, *et lucrum cessans*, through his not implementing the bargain.

ALLEGED,—No damage ; for *per me non stetit* that the contract was not fulfilled, seeing you did not provide nor seek out the ship to transport them ; neither did you *tempestivè* require performance, but only, after four or five years' cessation, required it by way of instrument. *2do*, It was never a complete perfected bargain ; in so far as there were three debtors in the price, and only two of them subscribed, and I entered into the transaction on the faith of all the three ; and he who refused was the person I trusted to more than the other two. And President Spottiswood, in his Practiques, *tit. Contracts*, p. 72, in the *Lady Ednam's case*, found such a contract defective, null, and not obligatory, because not subscribed by some of the parties.

ANSWERED to the *first*,—The looking out for a ship was an obligation incumbent on you ; and though there was no time prefixed for doing it, yet *præsenti die* must be the rule as soon as occasion offered, seeing *dies interpellat pro homine*. To the *second* objection,—The two subscribers offer to implement, not only their own part of the bargain, but likewise the third non-subscriber's part ; so *nihil tibi deerit*.

The Lords considered this was but a catch, after the five years, to crave implement ; and that he was to deliver the gloves equally among them, *pro rata*, and not *in solidum* to any one ; therefore they found the contract not obligatory,