1709. *June* 10. GEORGE MACKENZIE of INCHCOUTER *against* LORD MOUNTSTEUART.

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.

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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 obligement 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,

and assoilyied from damages. Some asked, What if they should charge him to implement the bargain yet, *quid juris?* But, this being decided as the process was laid, there was no need of determining who was bound to furnish and seek out the ship.

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1709. *June* 15. WILLIAM LIVINGSTON *against* JAMES LINDSAY.

WILLIAM Livingston dispones a tenement at the back of the Canongate, which he had acquired from the Lord Balmerino, to Sir Patrick Aikenhead, bearing, that he had borrowed from him £1000 Scots; therefore, in security and payment of that sum, and any farther sums he should happen to advance him afterwards, he dispones the said brewhouse heritably and irredeemably; which right Sir Patrick makes over to James Lindsay. Livingston raises a declarator, That it was only a redeemable right of its own nature, though the word *irredeemably* was by mistake inserted therein; for Sir Patrick never advanced more than the first £1000 Scots, which was far from being the adequate price of the house, which was worth more than 4000 merks; and these words explain the meaning of parties,---"That it was only for his security and payment;" which clause were nonsense if it had been designed to be an irredeemable right.

ANSWERED,---That, *esto* the £1000 were below the value, yet he has bestowed more than 2000 merks in reparations and brewing looms, which, with the first sum advanced, does far exceed the true value of the property; and Livingston, who is now irresponsal, designs to inveigle him in a tedious count and reckoning, he never being able to pay him the true sums he has on it, *esto* it were redeemable, as it is not.

The Lords thought the case dubious; yet, by plurality, found that clause of its being granted in security and payment, overruled the rest of the narrative, and made it redeemable; but so as Lindsay should not be obliged to denude till he got payment of his meliorations wared out upon the brewhouse. If it had not related to a special sum advanced, the Lords thought it would have been irredeemable: but they proceeded, *ex conjecturata voluntate et mente contrahentium*, to think no more was designed than a security.

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1709. *June* 17. HUTCHESON *against* WALTER CARMICHAEL.

WALTER Carmichael being the exeunt tenant out of the lands of Arniston, the herd of Hutcheson, the new entrant tenant, suffering his master's goods to encroach upon Walter's corns, the said Walter's servants fell a-quarrelling, and hound them off; whereupon a scuffle arises, and Walter, in defence of his servants, beats Hutcheson's herd, and bleeds him. Hutcheson exhibits a complaint against Walter, before the Justices of Peace, and, upon a probation by witnesses, obtains a decreet, fining him in £100 Scots to the clerk of court, for the riot, blood, and battery, and in 200 merks to Hutcheson, by way of assythment, and to lie in prison eight days, as a corporal punishment; and, after that