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. *Vol. II. Page* 502.

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

is elapsed, to continue prisoner aye and until the fines be paid; and accordingly he is incarcerated.

Of this sentence he presents a bill of suspension, containing a charge to set at liberty, on thir reasons, That he compeared and craved a double of the libel, with the names of the witnesses to be adduced against him, and a procurator to plead for him; all which was denied, as not the practice of thir summary courts; though it is both *juris naturalis et positivi* to allow a sight of the process, and a time to answer. *Secundo,* He offered to exculpate and prove, that Hutcheson's man was *versans in illicito,* and the aggressor; and objected against his witnesses, as being domestic servants: and yet all this was repelled. *Tertio,* The highest fine that can be imposed for such riots is £50 Scots; which they had most exorbitantly exceeded. All which he was able to prove by an extract of the process, which the clerk refused him, as being a party concerned in the fine, unless he would pay him two guineas; on which extortion he took instruments.

Answered,---The present question was not here to discuss the justice or injustice of the decreet, which they would sufficiently vindicate in due time, and show it was a most atrocious riot; but only whether he should be set at liberty, and the suspension passed; and there being now no Privy Council in North Britain, the hands of the Justices of Peace, in punishing riots for disturbing the public peace, ought not to be weakened; and they are content the suspension should pass, on consignation of the sums decerned for.

The Lords were sensible the fines were too exorbitant, and that it was not easy for a poor man to command so much money for consigning; and so, they having exceeded their power, they passed the bill on caution, without putting him to consignation; and, at discussing, it would appear who was in the wrong.

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1709. *June* 21. The Tutors of George Alison's Children *against* Anne Laurie and Andrew Dinnet.

Anne Laurie, relict of George Alison, merchant, enters into a transaction with Denoon, Blackader, and others of her children's tutors, to inventory the goods left by her husband in his shop, and then, at the sight of a bailie, to get them valued and appreciated; which extended to £3866 Scots, at which rate she accepted the ware, and gave bond for the same, bearing this clause,---She always liferenting the said sum. After this, she marries Andrew Dinnet; and he, being pursued for the price of the shop goods, alleges his wife, by the writ founded on, must liferent it; and so they cannot uplift it during her time.

Answered,---However that clause was by surprise foisted in, yet it was contrary to law; for it being her own children, who were minors, their money, neither could she warrantably reserve her liferent, nor they yield it, the same being an evident lesion to the poor infants.

Replied,---In contemplation of her reserved liferent, she had condescended to a most exorbitant price, far above the value of such old-fashioned ware. And as to such perishable goods, where there is great appearance of loss, tutors have been ever allowed to make rational bargains, otherwise none would buy from