BARJARG. Doubts of this deed being *intuitu matrimonii.* The case of *Bell* and *Somerville*, 16*th July* 1751, was much stronger, for there a formal narrative occurred of a prior marriage-contract.

GARDENSTON. This is a testimentary deed. The clause debarring his relations is a clause never used in a marriage-contract.

COALSTON. I never could find a foundation for the law which rendered all deeds null if done *intuitu matrimonii* when the marriage dissolved within year and day. I shall never be for extending a peculiarity in our law inconsistent with reason. This is a testament, not a marriage-contract.

PRESIDENT. I cannot get over the law in the case of the widow of Mr Gilbert Stewart. The claim for mournings was as a wife, not as one continuing a wife for year and day. The case of *Read* proceeded on this specialty, that the provision was in favour of the son, not of the wife, The law has made the rule as to year and day: a man's will often is to dispense with that law; but, if he omits to dispense, the Court cannot supply the omission. The narrative of the deed, and all its circumstances, concur in showing that it was executed *intuitu matrimonii.*

1766. *August 5.* DAVID MODREL of Muirmill *against* JOHN DIN, Portioner of Easter Craigannet.

IRRITANCY.

Lands being disponed in security of a debt, with a declaration, that, if the debtor did not redeem, before a certain term, the lands should be held as sold to the creditor irredeemably, without necessity of declarator; *found*, notwithstanding, that the irritancy was purgeable before declarator.

The ten-shilling land of Easter Craigannet, called Glendales, belonged to Andrew M'Clay. On the 7th November 1731, Janet Adam, mother of Andrew M'Clay, granted a bond to John Liddel for 1390 merks; and, although her feudal right in those lands does not appear, yet she became bound to infeft Liddel in them for the further security of his debt, principal and interest. At the same time Andrew M'Clay, the proprietor, granted an heritable bond to John Liddel for 600 merks upon the same lands. John Liddel, having been infeft upon those two bonds, did, on the 10th August 1737, obtain a decreet of poinding the ground, before the Sheriff of Stirling, against the tenants and possessors, as well as against Janet Adam and Andrew M'Clay. Liddel being about to adjudge the lands, a disposition was executed in his favour by his two debtors: The question in issue turned upon the import and consequences of that disposition. The disposition recites the two bonds, and the decreet of poinding of the ground; that Liddel had raised and had executed a summons of adjudication for adjudging the lands; that M'Clay was liable in both the bonds, and that the sum due on them, together with expenses, amounted to L.1600 Scots; and that " the said Janet Adam and Andrew M'Clay, foresee-

ing what would be the effect of the said decreet of adjudication, and the expenses that would be accumulated on him, the said Andrew M'Clay thereby, and being most willing and desirous to prevent the same, and to do all manner of justice to the said John Liddel, had therefore agreed to grant him the security underwritten."

Upon this narrative, Andrew M'Clay, "without prejudice to the said two heritable bonds, decreet of poinding, or farther diligence that had or might follow thereon," did accumulate the two debts into one principal sum of L.1600 Scots, which he became bound to pay to John Liddel within the years of reversion aftermentioned. Further, for his better security, Andrew M'Clay, with consent of his mother, disponed to Liddel, his heirs and assignees, the lands of Glendales, redeemable always by M'Clay, his heirs and successors, by payment or consignation "of the said sum of L.1600, and annualrents thereof, and that at any term of Whitsunday or Martinmas, betwixt or upon the term of Martinmas 1742, allenarly, upon 40 days' premonition," &c.; reserving to Janet Adam, her liferent of part of the subject, valued at L.30 Scots yearly. In case M'Clay, or his foresaids, should neglect to redeem the lands within the space foresaid, then M'Clay sold them to Liddel, &c. heritably and irredeemably, without necessity of declarator, with this proviso, that, in that case, Liddel should be bound to pay 600 merks, with the interest due, as contained in an heritable bond granted by M'Clay to Margaret Provan. Then follows this clause:—"And which accumulated sum above written, with the said sums due to Margaret Provan, are thereby declared, in the event of the not-redemption, to be the full and adequate price and value of the subject thereby disponed."

At the date of this disposition, it appears that the lands of Glendales exceeded in yearly value the legal interest of the price aforesaid. On the same 14th November 1737, John Liddel granted to M'Clay, and his mother, a general discharge of all claims, excepting always the two heritable bonds, the decreet of poinding the ground, and disposition aforesaid; and declaring that this discharge should be nowise prejudicial "to the two heritable bonds, sums therein contained, &c., nor to what may follow thereon." On the very same day on which the disposition was granted, Liddel was infeft: he immediately entered into possession, and he and his successors have continued to possess.

Soon after this transaction, Andrew M'Clay went into foreign parts, and never returned. His eldest son, William, made up titles to his father by precept of *clare constat* and infeftment; and, upon that, granted a disposition of the lands to David Modrell. On the 5th October 1764, David Modrell brought an action against John Din, the heir of Liddel, concluding for exhibition of the deeds above mentioned, and for having Din brought to account for his intromissions; and that, upon the debts being found extinguished by intromissions, or upon the balance being paid, he should renounce the lands, and make them over to the pursuer.

On the 20th December 1765, the Lord Auchinleck, Ordinary, found, "That, from the tenor of the disposition granted by Andrew M'Clay to John Liddel, joined with the amount of the price, not being quite twenty years' purchase in 1737, there is sufficient evidence that Andrew M'Clay did not intend to make

a sale of his lands, but only to obtain a delay of diligence from John Liddel his creditor; and, therefore, that the clause by which the lands are declared to be irredeemable, in case M'Clay did not pay up his debt to Liddel within the time limited, is to be considered as penal; and that it is competent to the pursuer, as in right of M'Clay, to redeem the lands, upon payment of the sum truly due, after discounting the intromissions had by the defender and his predecessors."

On the 23d February 1766, he adhered.

Against this interlocutor Din preferred a reclaiming petition, to which answers were put in.

ARGUMENT FOR THE DEFENDER:—

The right challenged, however redeemable in 1737, became absolute in consequence of redemption not having been used: There was then an irredeemable sale for what the parties understood to be the value of the lands. This appears from the additional price then covenanted, which, with the sums originally paid, was declared to be the adequate value of the lands. Upon this supposition, all the pieces of the feudal conveyance, as also the assignation to the rents, are formed. By providing that the two heritable debts should be kept up, nothing more was meant, however inaccurately expressed, but that they should not be extinguished until the right to the lands became irredeemable. Any small difference between the value of the subjects sold, and the quantity of the debts, will not be sufficient to set aside the sale. *Pactum legis commissoriæ in pignoribus*, was reprobated by the later civil law, because, in that law, *pledge* was a right different from *property*, and it was held an inconsistency for a pledge, by lapse of time, to become property; but this applies not to rights of reversion. By the law of Scotland, they are from the beginning rights of property, never rights of pledge. By the Act of Sederunt 1592, the Lords declared that they would decide in all clauses irritant, according to the express words and meaning thereof: This shows that the civil law, as to *pactum legis commissoriæ in pignoribus*, was not received into Scotland, and in no case has the Court extended a right of reversion beyond the time limited, when it appeared that the parties meant to conclude a true and irredeemable bargain of sale. But, supposing the lands redeemable, still the defender ought not to be found liable to account for the rents. If the lands were still redeemable after Martinmas 1742, the right in the defender since that period can only be considered as a proper wadset. Besides, the defender has levied the rents, and consumed them, *bona fide*, upon a title to which no apparent challenge lay, and therefore cannot be liable in repetition.

ARGUMENT FOR THE PURSUER:—

The right granted by M'Clay to Liddel, is plainly a right granted by a debtor to a creditor from the dread of diligence by adjudication. If it was redeemable in 1737 when granted, there is no reason for supposing that in 1742 it changed its nature, and became irredeemable. The same compulsion which occasioned the granting of the right, made the term of redemption to be limited to five years. This transaction differed essentially from a fair sale under reversion. It was not for a price paid, but an impignoration of lands for debts already contracted: though calculated to prevent diligence by adjudication, it was in effect more rigorous than such diligence. The legal of an adjudication would have subsisted for ten years; whereas, here, the reversion was limited to five years.

Neither was the debt discharged, which ought to have been done had those debts been considered as the full price of the lands. The payment of Provan's debt was an unnecessary stipulation; for that debt, being heritable, must have remained a burden on the subject, so that the payment of this debt could never be intended as an addition for completing the purchase money of the lands. It is certain that all the debts taken together did not amount to the value of the land on a fair sale, and this shows that the irritancy on not-redemption was rigorous and penal. When lands are impignorated for security of debt under clauses irritant, the Court has been in use to extend the equitable term of redemption, and not to suffer it to be foreclosed without declarator. The *pactum legis commissoriæ in pignoribus* was absolutely reprobated by the civil law: our ancient practice inclined to support such irritancies, but our later practice has approached nearer to the civil law, unless where a sale for an adequate price was originally intended, and a limited reversion granted, not of right but from favour. Whenever the irritancy has been added to a right originally in security, such irritancy has been considered as penal, and made purgeable until declarator. See Stair, b. 1, tit. 13, § 14, and Dictionary of Decisions, title *Irritancy*. As to the plea against accounting since 1742, it is frivolous: between 1737 and 1742 the defender is certainly accountable: the deed did not change its nature in 1742, and it is only upon the supposition of its not having changed its nature that the lands are redeemable at all. Had the rents fallen short of the interest of the debt, the pursuer would have been bound to make up that deficiency on redemption. As the rents have exceeded such interest, the defender cannot be allowed to retain them without account; for this would be to convert a right of security into a usurious wadset, contrary to the Act 62, Par. 1661. The answer to the plea of *bona fides* may be made in the words of Lord Stair, b. 2, tit. 1, § 24:—"When, by a common or known law, the title is void materially, the possessor is not esteemed to possess *bona fide*.—Durie, 16*th November* 1633, *Grant*." Liddel could not but know the nature of his own right, as being in security of debt, not absolute; and the defender can be in no better situation than Liddel, as he is the representative, not the singular successor of Liddel. He who *bona fide* spends the rents of an estate, believing it his own property, may be relieved from repetition at the instance of one instructing a preferable right. But that is not the case here: for, as Liddel's right was in security of debt, it was extinguishable by payment; and he has paid himself by levying the rents. Were he or his representative not liable to account, he would hold the subject and yet keep up the debts for payment of which the subject was granted; than which nothing can be more opposite to principles and practice. See Dictionary, vol. 1, p. 107-8; 8*th July* 1636, *Cleghorn;* and the late case, *December* 1760, *Heirs of William Sellers.*

On the 4th July and 5th August 1766, the Lords adhered.

Act. D. Rae. *Alt.* D. Græme.

OPINIONS.

Pitfour. A rule concerning irritant clauses was established by Act of Sederunt 1592; but at that time no such rights of property as that in question were known.

PRESIDENT. The cords of penal irritancies are not to be drawn closer in this age: the plea of *bona fides* will not authorise one to draw rents, and yet keep up the debt for which possession of such rents was granted.

COALSTON,—for adhering. The disposition 1737 was granted by a debtor in order to prevent diligence, not for a full price.—Redemption for equitable considerations is still competent. If so, how can we change an improper wadset into a proper one, and find the defender not accountable for the rents since 1742.

KAIMES. A *pactum legis commissoriæ in pignoribus* is good in our law, but reducible. The rents from 1742 were levied by the creditor, *qua* proprietor. Suppose these rents had fallen one half, the creditor would have had no demand for the deficiency, so as to make up his interests.

1766. *August* 6. FRANCIS BRODIE, Wright in Edinburgh, *against* the TRUSTEES of the MIDDLE DISTRICT in the County of MID-LOTHIAN, and THOMAS DICKSON, their Servant.

PUBLIC POLICE.

Powers of Road Trustees in widening a public road to the statutory breadth.

FRANCIS Brodie is proprietor of a tenement in the Canongate of Edinburgh, bounded on the east by the common vennel, called the Horse-Wynd: that vennel is a public road leading from Edinburgh, but at present it is not above ten feet wide. The trustees for the high roads in Mid-Lothian ordered Thomas Dickson one of their overseers to widen that road, in terms of law. In consequence of those orders, the overseer set about cleaning away rubbish, and was preparing to demolish some low houses within the limits of Brodie's property. Brodie made application to the sheriff for stopping this work. On the 25th July 1766, the sheriff pronounced an interlocutor to the following purpose:—"In respect this vennel is the only entry to one of the public avenues leading to the town of Edinburgh, finds it falls properly under the administration of the trustees, and that they have power to widen the same, in terms of the Acts of Parliament concerning public roads, upon provision that they pay the value to the proprietors for such houses as they shall be under necessity of taking down." Brodie offered a bill of advocation, which was refused by the Lord Kaimes, Ordinary on the Bills. He then applied to the Court by petition, to which answers were put in.

ARGUMENT FOR BRODIE:—

The damages arising to the petitioner from the plan of the trustees are obvious: part of his area will be seized for enlarging the vennel; his houses will be demolished, and the remaining part of his area will be rendered of no value on account of its narrowness. In these circumstances he pleads that the trustees have exceeded their legal powers. Whenever the property of a private man is taken from him for the public good, he is entitled in law to receive its full