

1696. *December 22.* The LORDS of COUNCIL and SESSION *against* SIR JAMES STAMFIELD'S CREDITORS.

HALCRAIG reported the competition between the Lords of Session, and Sir Stephen Fox, and the other creditors of Sir James Stamfield, who was pursuing a roup and sale of his lands of Halls, Morhame, &c. It was contended for the Lords, That they, being now proprietors, would not suffer the lands to be exposed to roup; for, *1m.* They had a wadset from my Lord Kingstoun for 100,000 merks, in 1663, affected with a back-tack; and the irritancy being incurred, they had declared the same; as also, had apprised in April 1671, which was long since expired.

ANSWERED,—The wadset was not over the whole lands, but only a part of them; and, notwithstanding of the declarator, the Lords had never extended their rights beyond their annualrents, nor put themselves in possession; and, being both judges and party, it was fit they should proceed with the more tenderness; and, as to their apprising, there was one led by Dorothy Clerk, (whereon infestment had followed;) and that being in March 1676, the Lords were not within year and day of it.

REPLIED,—Their restricting themselves to the annualrent was only *ex gratia*, and can never prejudice the full extent of their right, if they please to claim it; and though Clerk's apprising was more than year and day prior, yet the infestment on it was posterior to the Lords' apprising; and they designed no advantage, but only to hinder the roup, that so vast a sum of money might not be cast in their hand.

The Lords ordained the case to be argued in their own presence.

Vol. I. Page 745.

1696. *December 22.* The CREDITORS of SIR JAMES STAMFIELD *against* The CHILDREN of JAMES SCOT of BRISTO.

IN a debate between the same Creditors of Sir James Stamfield and the Children of James Scot of Bristo, who were pursuing upon an assignation granted to him by the said Sir James the day before he was murdered, *viz.* in the end of November 1687, to his share of the cloth-manufactory erected at Newmilns:

ALLEGED,---It was never a delivered evident, but found lying beside Sir James, and got up by James Scot after his decease. And this allegiance being found relevant, and referred to his oath, he deponed, that, being cautioner for Sir James in considerable sums, and otherwise creditor to him, they communed, that, towards his relief, he should give him this assignation to his part of that stock; and accordingly he met with him the Saturday before his death, and, calling for it, he told him it was subscribed and directed for him, and lying on his table; and on Monday, when he returned from the country, (whither he was presently going,) it should be delivered to him; and accordingly, he going to Newmilns, was found that night, or the next morning, strangled; but his table being looked, the assignation to him was found lying thereon subscribed, with a direction for James Scot; and this was contended to be equivalent to a delivery,

or a clause dispensing; seeing it is not so much the *traditio de manu in manum*, that makes the delivery, as a rational act of the will, declaring our purpose, design, and resolution.

ANSWERED,---This could never amount to delivery, because, *esto* Sir James had returned to Edinburgh, he could have cancelled that assignation; so it was still an incomplete deed, till something like an act of present tradition had intervened. If one should send an assignation in a letter, and die before the letter come to hand, yet it would be reputed a sufficient delivery, because he had done the ultimate act which his death cannot recal; but here it was revocable and alterable at will.

The Lords thought this a too nice and metaphysical tradition, and found it an undelivered evident; and preferred the creditors who had confirmed the subject in controversy; which James Scot neglected to do, relying on his assignation.

Vol. I. Page 746.

1696. *Feb. July, and Dec.* LORD PITMEDDEN *against* JAMES ELPHINGSTON and
The EARL of WIGTON.

February 20.---THE competition upon the estate of Dunfermline, betwixt my Lord Pitmedden, Commissary Elphingston, and the Earl of Wigton, was reported. The Lords demurred on thir two points: *1mo.* The debate running not for the rents of the lands, but anent an extrinsic sum of 6000 merks in Rothemay's hands, due to James, last Earl of Dunfermline, whether the preference given to Pitmedden's 10,000 merks, by the minute of contract betwixt him and Mr A. Auchmouty, (in whose place Commissary Elphingston had come,) that he should be paid out of the first and readiest, would extend to this extrinsic sum. For payment to Mr James Elphingston, out of such sums, would extinguish the wadset *pro tanto*, and so diminish Pitmedden's security, which was a *jus transcendente* over the whole; and, like a servitude, *unaquæque gleba* was liable to him: And, on the other hand, it seemed hard that Mr Elphingston could receive payment of no part till Pitmedden were first satisfied.

The second point was anent the legal way and habile diligence to affect debts owing to forfeited persons. Pitmedden had a precept, on the King's Chamberlain, of the estate of Dunfermline, from the Lords of the Treasury, and first intimated. Mr James Elphingston and the Earl of Wigton had arrested in Rothemay's hands; against which it was ALLEGED,---That Dunfermline being *civiliter mortuus* by the doom of forfeiture, the money could not be arrested in Rothemay's hands as belonging to him; the dominion being translated from him to the King.

ANSWERED,---The arrestment is laid on upon a process raised at their instance against the officers of state.

REPLIED,---It was never heard, that debts fallen to the King could be arrested, as appears where he is *ultimus hæres*, &c.; but the method is to apply to the Exchequer. Against which it was OBJECTED,---That all went there by gratification and favour; so poor people would be neglected, and others would get pre-