Menzies had done, Pitlurg was *in mala fide* to purchase these lands thereafter, unless there had been a new subscribed offer, and duly intimated *ut supra*.

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1703. *November* 13. A CREDITOR of KER of LOCHINCHES *against* MARY KER, his Relict.

A CREDITOR to Ker of Lochinches pursues Mary Ker, his relict, on the passive title of intromitter, for payment of his debt.

ALLEGED,—Any intromission she had was by virtue of a disposition from her husband to his haill moveables. And the disposition being now produced, it was

OBJECTED,—That the same bore not to be for implement of the provision contained in her contract of marriage, but purely for love and favour; and so was *donatio inter virum et uxorem*, and could not prejudge a lawful creditor, and should have been confirmed before her intromission.

ANSWERED,—She only used the disposition to connect it with her contract; and whatever was its narrative by mistake, yet truly it depended upon the antecedent onerous cause of her matrimonial provisions, and must be drawn back *ad suam causam*, to support her contract.

The Lords found the disposition a sufficient title to purge vitiosity, so as not to be universally liable; but found she behoved to pay him *usque ad valorem* of her intromission, seeing they could not redargue so plain a narrative, nor turn it to be onerous, against its express words; and that she ought to have confirmed herself executor-creditor on her contract of marriage and disposition. Yet see Stair, *26th January* 1669, *Chisholm* against *Lady Brae;* where the Lords sustained a tack to a wife as a remuneratory donation to make up the defects of her contract of marriage, though the tack bore only love and favour. But the Creditor's case was more favourable here, that the Lady Lochinches was in peaceable possession of her jointure-lands; and the Creditor did not quarrel her on that head, but only for her superintromission; which she ascribed to a clause of conquest in her contract-matrimonial. But the Lords found her liable, in so far as her intromission exceeded her jointure, on the grounds aforesaid.

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1703. *November* 18. SIR WILLIAM BINNY of VALLEYFIELD, *against* SIR ALEXANDER BRAND of BRANDSFIELD.

TILLICOULTRY reported Sir William Binny of Valleyfield against Sir Alexander Brand of Brandsfield. The said Sir William and Alexander entered into a tripartite contract with Sir Thomas Kennedy, *in anno* 1693, for buying 5000 stand of firelocks to the Government; by which bargain they had £1500 sterling of net profit. On this agreement Sir William charges Bailie Brand for £500 sterling as his third part of the said profit; who suspends, on thir reasons: 1*mo*. That the said contract was found defamatory at Privy Council, against two noble persons therein named, and so cannot be the foundation of a charge now; 2*do*. It is null as wanting witnesses, and not designing the filler up of the date, which,

by ocular inspection, is done by another hand, different from the writer of the body of the paper; and being posterior to the Act of Parliament 1681, is not suppliable by condescending on the writer, *ex post facto; 3tio.* Though, by an Act of Treasury, Sir Alexander Brand was once allowed to retain the said £1500 sterling out of the first end of his tack-duty of Orkney and Shetland, yet they have since put a stop to it, on the discovery of their private transaction, and so his counts are not finished; whereby he cannot pay their shares, till he get it allowed.

ANSWERED, to the *first*,—They were fined for the defamatory part of this agreement, and so that sentence purged the fault; so that the paper stands obligatory and in force against Sir Alexander, who is *in mala fide* to obtrude this, being *in pari* if not *in majore culpa*, as to that defamation, than Sir William Binny is to the second.

ANSWERED,—That the writ was probative though wanting witnesses, being *in re mercatoria*, and a bargain for arms; and where there were three or more parties contractors subscribing, they were found mutually witnesses one to another, 19*th July* 1676, Forrest *against* Veitch. And as to the objection, That the filler up of the writer's name and date is not designed in the body of the writ, the same is no nullity, nor required by the Act of Parliament 1681, which mentions only that the want of the writer shall not be suppliable; as was found 30*th November* 1683, *Watson* against *Scot*, observed by President Falconer.

To the third, ANSWERED,—That the Act of Treasury neither is nor can be recalled, seeing he is expressly allowed retention of as much of the tack-duty of Orkney in his hands, and which he actually detains to this hour.

The Lords repelled the nullities, and found the writ valid and probative; he always proving his condescendence, that it is filled up by Sir Thomas Kennedy's own hand. And as to a present decerniture of paying Sir William's third part, some of the Lords moved, that, on Sir William's finding caution to refund if the Exchequer should reject the article, Bailie Brand might be decerned in present payment; but the plurality thought it enough to find him liable in his third part, and delay the payment and extract of the decreet till the 1st of September next, that Bailie Brand might, *medio tempore*, apply to the Exchequer and Treasury to get his accounts finished, and that article allowed, and taken off his hands; but ordained him to find caution to Sir William, to pay his dividend, how soon he gets it allowed.

In this cause, the Lords took notice of some reflecting, indiscreet expressions in Bailie Brand's printed information, and, among the rest, of thir words, That what he had said did prove Sir William Binning and Sir Thomas Kennedy to be infamous cheats, not worthy to be conversed with, and who ought to be ashamed to show their faces in public again; for though they had been fined for attempting bribery, yet *veritas convitii non semper excusat*, and he was equally guilty, and the sentence did not, *per expressum*, impose infamy. And if beating, *pendente lite*, loses the cause by the Act of Parliament, what deserves he who robs one of their reputation, by so public a defamation? The Bailie being called in, and asked if he owned these words, and if they were his own or his lawyers'; he ingenuously purged his advocates, and acknowledged they were of his own adding, being much provoked by their tricks; but, if they offended the Lords, he begged their pardon. However, the Lords, to discourage such reflections in time coming, fined him in 900 merks, to be applied to pious uses, at the sight

of the Lords; and sent him to prison till he paid it, and likewise craved both the bench and the parties' pardon for his offence. *Vol. II. Page* 191.

1703. *November* 24. CURRIE, EWART, and INGLIS, *against* MUIR and GORDON.

GEORGE Callander having a wadset-right for 4000 merks on the lands of Torrs, and Marion Glendining, his wife, having the liferent of it, having married Commissary Inglis for her second husband, they transact the foresaid sum for 3000 merks with Lidderdale of St Mary Isle, and give him up the wadset, and take a bond from him, narrating that the money was originally George Callander's, but that John Inglis had some rights and securities on these lands then settled in his person; therefore, he obliged himself to pay 1800 merks of the said sum to John Callander, son to the said George, and the remanent 1200 merks to Margaret Callander, his sister; and in case they should die without heirs of their body, or unmarried, then the said sums should fall, appertain, and belong to the said John Inglis his children procreated betwixt him and the said Marion Glendining, mother to the said John and Margaret Callanders. John was married to Janet Muir, and had children, but they died before him: Margaret died unmarried. Janet Muir being remarried to James Gordon of Cambeltoun, he acquires sundry debts owing by John Callander, his wife's first husband, and thereon confirms her and himself executors-creditors to the said umquhile John, and pursues Lidderdale for payment of the 3000 merks to them. Commissary Inglis having two daughters by Marion Glendining, the said John Callander's mother, who were married to David Currie and John Ewart, they, and their husbands, pursue a declarator against Lidderdale, that they, as substitutes to John and Margaret Callanders in the three thousand merks bond, by virtue of that substitution, had right to the foresaid bond, and therefore he should be decerned to pay them. Compearance is made for Janet Muir and Gordon her husband; who craved preference: 1*mo.* For the 1800 merks payable to John; because the condition upon which the substitution was made, never existed *quoad* him, seeing he was married, and had children, though they died before him.

The Lords reduced the substitution as to the sum provided to him, and preferred his relict as executrix-creditrix in the said sum. The only question and difficulty was as to Margaret's share, viz. the 1200 merks, she never being married; and, therefore, it was contended by Commissary Inglis's daughters and their husbands, that their declarator was clearly founded in law,—Margaret never being married, and they being her substitutes in that event, and their father having an interest in the wadset-lands, as the narrative of the bond acknowledges.

ANSWERED,—It is plain the wadset-right originally belonged to Callander, her last husband's father, and the bond was granted in contemplation and satisfaction of that right; and, therefore, it was both undutiful and unjust in Callander's relict and her second husband, Inglis, to substitute her children by Inglis, (who had no relation to Callander's nearest of kin,) to the prejudice of Callander's other heirs, who ought not to be debarred by any such substitution, contrived by their stepfather to his own children, and to their seclusion. 2*do.* Inglis was so conscious of the injustice of this step, that, to rectify this *faux pas*, he