to treat and commune; and the second letter can be no warrant, because the minute was entered into prior thereto; and it does not appear he then knew, or was acquainted that they had sold it by a minute; but he seems to look on it still as in the terms of a communing, and no consummated bargain; and men's heritage ought not to be sold on such general warrandice as these.

The Lords found the heirs of Mr James not obliged to implement this minute of sale.

The heirs would not have much quarrelled the bargain, either on the inequality of the price or otherwise, but in regard it was designed the same should not fall to them; for he had named his Lady executrix and sole legatrix, and she had agreed with Mr John Forrest, minister at Prestonhaugh, (who had married one of the three sisters and heirs-portioners,) and for a sum of money had made it over to him; and he claimed the price as moveable, and falling under executry, to the exclusion of the other two. And he contended it was as much moveable as if it had been money lying beside the defunct: though some of the Lords thought the price heritable aye till the bargain was perfected by an extended disposition. But this point was not determined at this time.

Vol. I. Page 740.

1696. *December* 4. MR HARRY IRVING *against* MR WILLIAM IRVING.

ON a bill given in by Mr Harry Irving against Mr William Irving, son to Drumcoltran, this point occurred to be argued amongst the Lords,—Whether one debtor in a sum, and creditor by a clause of relief, as cautioner, can plead retention against an assignee until the cedent first relieve me of my cautionary. It was not doubted, if he be distressed, that the compensation meets. The only question is, If retention be legal before distress. The Lords, in the case of *Lord Sinclair* against *the Lord Bellenden*, found the registration of his bond a sufficient distress; and more lately betwixt the *Laird of Gadgirth* and *Mr David Scrymzeour*, and in other cases, they sustained retention though there was no distress. But the Lords superseded to determine here till it were farther considered.

Vol. I. Page 740.

1696. *December* 8. DAVID THREIPLAND *against* The MARQUIS of DOUGLAS.

PHILIPHAUGH reported Mr David Threipland against the Marquis of Douglas, as donatar to the Viscount of Dundee's forfeiture, for declaring Clavers's estate liable for the sum of £1400 Scots he violently took from his collectors of excise when he entered Dundee in 1689.

ALLEGED for the donatar,---That this was a debt contracted after Clavers was in actual rebellion, and the treasury should be liable for that, and have given the tacksman a proportional abatement and deduction of their tack-duty on that account; but the donatar cannot be burdened therewith.

ANSWERED,---If it had been voluntarily lent, they not only deserved to lose their money, but to be demeaned as serving traitors; but, where it is taken

manu forti, they have both the Lords of Treasury and the estate their debtors, conform to the Act of Convention in 1689.

The Lords found the Viscount's estate affectable with this debt. Some were for trying if it was applied to the use of the Highland army; in which case, being *in statu belli*, Clavers himself would have been free; but it was decided *ut supra*. *Vol. I. Page* 741.

1696. *December* 8. ROBERT M'MILLAN *against* AGNES BINNY.

THE Lords advised the debate between Robert M'Millan, flesher, and Agnes Binny, relict of Andrew Nisbet, candlemaker in Edinburgh. The point was, —She founded on a disposition from her husband.

ALLEGED,—It was *omnium bonorum*, and on deathbed, and so cannot prejudge lawful creditors.

ANSWERED,—She made use of it only to fortify her contract of marriage.

REPLIED,—It bears no relation thereto, and expresses no other cause but love and favour.

DUPLIED,—That hinders not her founding upon it to connect it with an onerous antecedent cause; as was found, *26th January* 1669, *Lady Brae* against *Chisholm*.

The Lords thought it dangerous to creditors, if such latent general dispositions *in lecto* were sustained without confirmation; yet found it a colourable title to purge vitiosity. And it being put to the vote, Whether it should make her liable *in valorem*, or bring her in *pari passu* with the creditors, but would not give her a preference: and the bringing her in equally carried but by one vote; for sundry were clear to find her liable for her intromission *quoad valorem*; reserving her pursuit on her contract of marriage, as accords.

Vol. I. Page 741.

1696. *December* 10. JOHN SANDILANDS of COUNTESSWELLS *against* MITCHELL, in Aberdeen, and ROLLAND of DISBLAIR.

CROCERIG reported John Sandilands of Countesswells, against Mitchell, in Aberdeen, and Rolland of Disblair, being a competition between a general and a special assignation to some back-bonds. The general is first intimated; but, wanting the papers when it was drawn, it does not condescend on the date or tenor of it, and bears only *a back-bond*, in the singular number; whereas there were more than one: and, in a pursuit of exhibition at his instance, Mitchell discovering this defect, he procured a special assignation. But the Lords looked on this as a trick, and preferred the general assignation.

Vol. I. Page 741.