AUCHINLECK. All small heritors, just as mites in a cheese, are our fellow-creatures.

On the 18th July 1771, "The Lords found, that every heritor or proprietor of lands and houses in the parish of West Kirk, who, by his title-deeds, is liable in payment of cess and parish burdens, has a title to vote in the election of a schoolmaster of said parish, whether such heritor's lands stand separately valued on the cess-roll or not: Found that, in the case of a liferenter or fiar, the liferenter has a right to vote on the liferented subjects, and not the fiar;" adhering to Lord Monboddo's interlocutor.

Act. A. Belches. *Alt.* J. M'Laurin.

1771. *June* 15. JAMES BREMNER *against* LIEUTENANT-COLONEL JAMES SINCLAIR.

BONA ET MALA FIDES.

Money found in the Repositories of a Factor. *Bona fide* intromission therewith. It gives a legal title of competition with Creditors.

[*Faculty Collection, V. p.* 263; *Dict. App. I.; Bona et Mala Fides, No.* 2.]

PITFOUR. Whenever my money is in my factor's hands, if I can prove the identity, I am entitled to retain it. So it was determined in a late case of *Ruthven's Creditors.*

KENNET. In that case the identity was proved; not so here.

PRESIDENT. There may be cases where money may be detained as the property of the master; as when a factor, just after receiving a certain sum, breaks his neck by a fall, and has that precise sum in his pocket: but here there is not sufficient evidence that the money detained by Colonel Sinclair was the money received by the factor in payment of the rents.

KAIMES. Colonel Sinclair possesses the money *bona fide*: ought he not to be allowed to retain it, in so far as to create a *pari passu* preference?

JUSTICE-CLERK. Colonel Sinclair acted *bona fide,* and intromitted with the money at the sight of the nearest of kin.

On the 13th June 1771, "The Lords, in respect that the money intromitted with is not proved to have been the rents received by Ross, found that Colonel Sinclair has no right of retention, further than to so much as extends to a proportional share with the executor-creditor;" varying Lord Gardenston's interlocutor.

Act. G. Wallace. *Alt.* W. Mackenzie.

Diss. As to any retention at all, Barjarg, Elliock, Stonefield, Hailes, and Monboddo.

1771. *July* 18.—COALSTON. There is a distinction between money-rent and victual-rent. Victual in my girnal, whereof my factor has the key, is mine:

there is a difference as to money-rent, unless the identity is proved; and therefore the first part of the interlocutor is well founded: but I do not understand how a *bona fides* can give any right which the law does not give. I am glad to see that Colonel St Clair did not open any repositories, but received the money from the executor: Still he must be just in the same case as other creditors.

KAIMES. The interlocutor does not stand upon the footing of preference. Colonel St Clair received payment of a just debt from the nearest in kin: still there is a *res in medio* attachable by all the creditors.

Quæritur. Is not this sufficient to render unnecessary a citation of the executor's creditors?

GARDENSTON. I would adhere to the rules of law. There is a certain way known in making up titles. No person can lay to his hand. There is certainly a *bona fides* on the part of Colonel St Clair; but *where* is that to stop? The case of *Magbiehill* was erroneously decided. I may say so: for the Court itself, in a late case, (Galloway,) has said so.

AUCHINLECK. I have no doubt of Colonel St Clair's *bona fides*; but he has been ill advised. The executor *qua* nearest of kin might have paid *primo venienti*, providing the *primus veniens* had taken a decreet. *Here* the rule applies *vigilantibus jura*. It is dangerous to say that a man, by acting irregularly, is in as good a situation as if he had acted regularly.

KENNET. If Colonel St Clair had taken a decreet, he would have drawn his *full debt*. May he not still draw *his proportion* just as if he had used a citation?

PRESIDENT. Suppose the executor *qua* nearest of kin had made a division among all the creditors except one, who did not concur, would you allow *that one* to carry off the whole subject?

JUSTICE-CLERK. There was no occasion for the executor *qua* nearest in kin to place this sum in the inventory, because it was already in his hands: He paid to Colonel St Clair, because he did not suppose there was any other creditor. May the other creditors, after years are elapsed, come in and claim decreet, so as to exclude Colonel St Clair?

COALSTON. Creditors, who all use diligence within six months, will be *pari passu* preferable: after six months, the creditor who is first in diligence will be preferable to all others. Here payment was made by an executor to a creditor without decreet: such payment gives no preference. Why bring him in *pari passu?* This deprives the other creditors of the *jus quæsitum*, which they had already by decreet. It unhinges the whole doctrine of confirmation.

KAIMES. The creditor who has received the money cannot do diligence. All that he asks is a *pari passu* preference, which he would have got had it not been for the accident of the money being in his hands.

On the 18th July 1771, "The Lords adhered to their interlocutor of the 13th June 1771."

Act. G. Wallace. *Alt*. W. M'Kenzie.

Diss. Gardenston, Auchinleck, Barjarg, Coalston, Hailes. Absent, Alemore, Stonefield, Monboddo.

This judgment, more distinguished, in my apprehension, for equity than law,

was carried by the President's casting vote. It has so many circumstances attending it, that there is little hazard of a case exactly similar occurring once in a century.

1771. *February* 28. ALEXANDER IRVINE of Drum *against* EARL of ABERDEEN.

GROUNDS AND WARRANTS.

Letters of general and special charge, being warrants, not necessary to be produced after twenty years.

[*Faculty Collection, V.* 247; *Dictionary*, 5187.]

PITFOUR. It was determined, in 1725, that general charges were *warrants*, not *grounds*. Warrants are not to be forced after the lapse of twenty years.

AUCHINLECK. In the case of *William Sellers*, 1757, it was found, contrary to my interlocutor, that general charges need not be produced after twenty years; and this has been held in practice ever since.

MONBODDO. The words of the decree are express: besides, the pursuer is bound to produce the charges, if in his possession. The lapse of twenty years affords an excuse for not producing papers, if mislaid or lost. I do not think that the defender has the privilege of keeping up papers whereof he is possessed. *Charges* in one decision are considered to be *warrants*, I think erroneously. Warrants are the steps of process; but grounds are the writs and evidents, the foundation of the decreet. Of this nature are charges general and special. In the case of *Sellers*, there were many specialties. It carried by President Craigie's casting vote against the opinion of Lord Elchies.

PITFOUR. The case of *Sellers* was not determined upon specialties. The same judgment had been previously given in the *Creditors of Carthrene*.

PRESIDENT. In argument, stress may be laid upon specialties; nevertheless, the judgment in the case of *Sellers* was in point: it would be dangerous to alter it. I will not do that injustice to the House of Lords, as to suppose that it meant to order every deed to be produced, without considering what was the nature of the deeds, or what was the law of Scotland.

GARDENSTON. I doubted of my power as an Ordinary to limit the words of the decree of the House of Lords: besides, I do not see a reason for the decision in the case of *Sellers*.

COALSTON. In consequence of the decision of the Court of Session, I have held that *charges* are *warrants*, and that, after 20 years, *warrants* need not be produced. In strictness of speech, nothing is a *warrant* but the judgment of the Court. The meaning of the decree was to repel the preliminary defence, and to find that the defenders must take a day to produce. The words of the decree are inaccurate; and hence, the pursuer endeavours *captare verba*, contrary to the purpose of the House of Lords.