1650. *January* 1. BALMANNO and CHAPMAN *against* LITTLEJOHNE.

[*See pages* 436 *and* 437.]

IN the suspension and reduction, Balmanno and Chapman against Littlejohne, it was farther opponed to the reason, That the woman, deceased before her husband, behoved yet to have an heirship; since, by her contract of marriage, the most part of her moveables were excepted, by express agreement, out of the communion of goods betwixt man and wife, *quæ jurisconsultis et humanitatis studiosis dicuntur bona receptitia.* For clearing thereof, the Lords would have the contract of marriage to be produced.

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1650. *January* 1. LOWRIE *against* MAKCALL and FERGUSONE.

[*See page* 447.]

LOWRIE, pursuing a reduction of infeftment against Makcall and Fergusone, upon an irritant clause contained in the infeftment, if two terms should run in the third,—the Lords found the clause committed; but, in respect the lands were sold to one Gibsone for the sum of 1600 merks, it was ordained, That Lowrie, superior, should pay to the said Gibsone the foresaid sum; and that the rather, because he was content to take his own land upon that condition.

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1650. *January* 2. FORBES of BALNAGASKE *against* FOULLERTOUNE of KINNABER.

IN the action of Forbes of Balnagaske against Foullertoune of Kinnaber, for registration of a contract of marriage against Foullertoune, as successor *post contractum debitum titulo lucrativo* to his goodsir,—wherein litiscontestation was made, *parte non comparante*,—the Lords not only received the said Foullertoune to propone an exception newly come to his knowledge, and verify the same instantly, (which may be done suppose there were compearance in the act of litiscontestation,) but also to propone any peremptor, and verify the same instantly; as that which was proponed in the process, before he past from his compearance, he not daring to abide by it at that time, but which now he is to avow; to wit, that he cannot be thought successor *titulo lucrativo*, seeing he has his infeftment from his uncle, cedent to the pursuer. Now, the exception *noviter perveniens ad notitiam*, was, That the contract of marriage could not be registrate against him, because it was satisfied; and the sum of 4000 merks, thereby provided, was paid to his cedent, in so far as the said cedent, called Gideon, was infeft, by the defender's goodsir and his own father, in the lands of Kinnaber and others, redeemable upon 12,000 merks; which was thrice so much as the four contained in the said contract; the which infeftment the said Gideon had renounced, being major, *sciens et prudens*, and had granted the receipt of the said 12,000 merks; et nemo presumitur donare quamdiu debet;—L. si quis, 21, pr. ff. de Don. int. Vir. et Uxor. L. rem legatam, 18. De adim. vel transfer. leg. et donari

videtur quod nullo jure cogente conceditur. L. Donari, 29, in pr. ff. De Donat. et L. Donari. 82. De Reg. jur. ff. ubi Cujac. Si, jure naturali cogente, concedatur, donatio non est. L. hoc jure, 19. sect. si quis. ff. De Donat. et ex ead. L. 19, sect. 1, ait remunerationem non esse donationem, quod non pertinet ad casum nostrum, sed ad leges certum donationibus modum statuentes, et ad tit. de revocand. donat. Cod. remuneratio enim non est mera liberalitas, sed quasi merces et pretium. D. sect. 1, et L. pen. sect. ult. eod. ff. L. si ut certo. 5, sect. nunc videndum commod. L. 2, sect. et generaliter vi bon. rapt. ff. et naturaliter debetur. L. sed etsi 25, sect. consuluit. 11. De pet. hær. L. si pignore, 54, sect. 1. De furt. ff. At donatio, ibid. ab eo definitur mera liberalitas, quæ in alium, nullo jure nullaque ratione cogente, confertur; et ait regulæ illi jungendas, L. Vir usuras, 54. De Donat. inter Vir. et Uxor. cum L. si quis pro. 21. sect. si uxor eod. ff. Est Annodii in declam. pro filio contra patrem, Quod non licet subtrahi, non possumus dicere id liberalitate conferri. Adde Senec. lib. 3, de Benef. c. 21.

And, in this case, the goodsir to the defender, father to the said Gideon, was *debitor, ex contractu matrimoniali,* in a certain sum; the triple whereof he grants to have received, suppose not in satisfaction of the said lesser sum, but for renouncing of the said infeftment: which must be presumed to have been given in satisfaction of that debt; otherwise, a father, out of the natural bond of affection, may provide his son to a portion of land, and, after that, to another portion, and both stand effectual; as was decided betwixt the Earl of Marr and his son, Henry, and his oy, the Lord Cardros. There was also something alleged out of lawyers, *de debito conventionali et legali, et an dos imputetur in legitimam. Item,* That the foresaid infeftment was given to him when he was only twelve or fourteen years old; where, by the contract of marriage, he could not have the 4000 merks while he was past twenty-one years. Yet it was a true debt, *et dies cessit licet nondum venerit;* and the father might have paid before his day, howbeit the payment by the grant of 12,000 merks received was made after he was twenty-one years. Neither did he ever call this in question during his father's lifetime, who lived sundry years thereafter, he living with him, and reaping the benefit of his liferent; and not only meddling with all the plenishing after his decease, but detaining violent possession, (with Caddell of Aslowne, who married his sister, and got 7000 merks of tocher, by and attour other seven given with the other two sisters,) until these were all put from their violent possession; and entering in bargain with Forbes, the pursuer, did make assignation, among other bargains, for little acknowledgment; and being a simple man, was sent away to Holland with his sword.—*See page* 452.

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1650. *January* 2. ROBERT LOGANE *against* ————.

IN that removing by Robert Logane, as having right from James Logane, his father, who, after that he was denuded of the superiority in favours of his eldest son and daughter-in-law, by virtue of their contract of marriage, and a base infeftment, was retoured heir to the proprietor, and that to be holden of himself, because his son's and good-daughter's infeftment was never confirmed by the town of Edinburgh, superior to them all;—the Lords would hear the cause, in