

*quoad non executata*, albeit the executor was but a stranger and had not *jus sanguinis*.

*Act.* Wallace.

*Alt.* Lockhart.

*Advocates' MS. folio 56.*

1666. *November 10.* ARCHBISHOP OF ST. ANDROIS *against* His TACKSMEN.

IN this case found, That the act of Parliament declaring all valuations and decreets of Plat null, deduced since the 1637, did put the intromitters with the teinds *in mala fide* to pay to any other, albeit they paid by virtue of a sentence.

*Act.* Sinclar.

*Alt.* Beton.

*Advocates' MS. folio 56.*

1666. *December 20.* HAY of Knockhoudie *against* JOHN LITTLEJOHN.

JOHN LITTLEJOHN, merchant in Edinburgh, having comprised the liferent of a tenement in Leith, which being ruinous did thereafter fall; by which another tenement lying adjacent, belonging to Hay of Knockhoudie, was damnified in the sum of three or four hundred merks; after trial by the Dean of Guild and Council of Edinburgh, being found to be no less; for which Knockhoudie raises summons for payment of that sum, as the damage and interest sustained by him through the fall of his house.

ALLEGED, That he having comprised but the liferent of that house, his right was but temporary, and the heritor only could be convened to pay the sum acclaimed.

The Lords found the compriser of the liferent liable for this damage, reserving action to him against the heritor and liferenter for his relief.

*Act.* Norvell.

*Alt.* Lockhart.

*Advocates' MS. folio 56.*

[See the conclusion of this case, *infra*, page 441.]

1666. *December 20.* LYELL *against* BRAND.

LYELL, a chapman, having deposited his pack *custodiæ causa* with Brand, a merchant in Dundee, from whom he also borrowed L.5 Sterling: and Brand, after the chapman's absence by the space of a month, having by warrant of a bailie opened the pack and inventoried the same, but without any sentence recovered against the chapman for payment of the L.5; and being pursued for spulvie of the pack, he ALLEGED, That the chapman being his debtor, he did only sight the pack, to see what he had for his money, but noways alleged the pack was impignorat to him for his security; and being done *authore prætoris*, it ought to

liberate him from a spulyie. The chapman was content to restrict the spulyie to vitious intromission, providing he gave *juramentum in litem*.

The Lords found the libel ought to be restricted; but in respect the pack was closed, and so delivered to the defender, and only depositat *custodiæ causa*, and not impignorat, and that it was impossible to prove the libel otherways nor by the pursuer's oath, they allowed him *juramentum in litem*. This may seem strange, how the Lords could allow this kind of oath, which is only in spulyies, and in no other actions, and which *extra* that particular case is not approven in law; being *juramentum affectionis*, and not *pretii et valoris*. But the Lords reserv- ed the modification to themselves, at the advising of the cause.

*Act. Dinmuire. Alt. Mackeinzie and Colvill.*

*Advocates' MS. folio 56.*

1667. *January 8.* TYRIE *against* OGILBIE of Milnetoune.

THE case was thus: Park being debtor to David Tyrie in L.1000, and having purchased an assignation to a debt owing by Ogilbie of Milnetoune to John Rynd; and of the which debt, Park, by a bond of relief, was bound to relieve the Laird of Milnetoune; and Park having taken the assignation blank, he fills up Tyrie's name in it; who, charging Milnetoune to pay the sum, he suspends on this reason,—That the assignation was procured by the means and moyen of Park, and delivered to Tyrie blank, who filled up his name in it; and so being procured by his means, he offered to instruct instantly by writ that Park was obliged to relieve him of it.

The Lords found, where bonds of relief are granted by parties who thereafter purchase blank assignations to the same very debts which they are bound to relieve, that these assignations, though delivered to creditors for causes onerous, yet that they are in the same case as if they were in the person of him who is obliged in relief.

This may seem strange, that the assignee, who is creditor, and possibly *bona fide* granted discharge to the party from whom he got the assignation, should be prejudged by his fraud and cheat; but it seems to have much equity in it, and tends much to discourage fraudulent conveyances of rights, which both judges and lawyers ought mainly to regard.

*Act. Dinmuire. Alt. Seaton.*

*Advocates' MS. folio 57.*

1667. *February.* PURVES *against* LORD COLVILL.

MY Lord Colvill holding his lands ward, and *moribundus et in lecto*, precipitates the marriage of his heir, that the casualty of the single avail thereof may not fall to the king and his donator; whereon Sir William Purves raises an action against this Lord, after the old Lord's decease, for the avail of his marriage.