appears his gift is burdened with Ramsay's being his depute, and is expressly relative to the foresaid act of town-council, conferring the said office on Ramsay during life; and to be a ratification thereof in a head-court held in April thereafter.

ANSWERED,—The Wedderburns, for fourteen generations, had been clerks of Dundee, and always had the nomination of their own deputes, who precariously depended on them, and were during pleasure; and so was this Ramsay during all the time of the pursuer's father's life. And the act founded on in January 1695 is destitute of all manner of warrant: notwithstanding, by an act of the town-council of Dundee, all their minutes are ordained to be subscribed by the provost, or other preses of the meeting for the time. And Mr Wedderburn does not so much found on his admission in 1696, as on a gift of the said place to him in his father's lifetime in 1685, allowing him to remove the depute, in case they could not agree. And the town-council, by no posterior act, could derogate from that right, neither can he be deprived of it without some fact or deed of his own, importing his consent; which cannot be instanced; for the minute adjected to his own admission is no deed of his, neither did he ever ratify or homologate the same; nor was the deputation ever extended in the terms of that minute; and though Ramsay has continued in possession of the office now these seven years, yet it is not by virtue of that clause, but merely by the principal clerk's tolerance and connivance: and though *magna est consuetudinis authoritas*, yet *non est adeo sui valitura momento, ut vel rationem vincat aut legem.*

REPLIED,—No regard to the gift in 1684, because it was before the office vaiked, Mr Wedderburn's father being then alive, and *in officio*, and so was conferred *in tempus inhabile*; and though the warrant of the Act 1695 be not extant, yet the principal clerk acknowledges he once saw some warrants, but does not particularly know what tenor they were of; and it appears there were many minutes of acts then unsigned by the preses; and abstracting from that act in 1695, the principal clerk's own admission bears Ramsay's right *in eodem contextu* and *corpore juris*, and is margined with his own hand,—" Act in favours of James Ramsay;" and he cannot both approbate and reprobate the same act. And the clerks of session, though the register die or be changed, yet the successor never quarrels their gifts they had during life; and if there be any defect in Mr Ramsay's admission, the principal clerk's right *eodem laborat vitio.*

The Lords sustained Ramsay's defence, and found him not removable without a fault. See Dury, 16*th July* 1642, *Elder* against *Mercer.*

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1703. *July* 24. CHARLES MENZIES, Writer to the Signet, *against* MENZIES of KINMUNDY'S TUTOR and ALEXANDER GORDON of PITLURG.

CHARLES Menzies, writer to the signet, against Alexander Gordon of Pitlurg, and others. Menzies of Kinmundy's estate being overburdened with debt, and the heir being left minor, the tutor obtains a decreet of the Lords, on cognition of the debt, allowing him to sell his pupil's estate in whole or in part to the best avail; for doing whereof in the most effectual way, he emitted placarts, and affixed them on the cross of Aberdeen, and other adjacent churches, for a voluntary

roup on the 6th day of November 1701. Accordingly, Charles Menzies, uncle to the children, desirous to preserve the memory of his predecessors, that it might not go out of the family, he bids, after various offers, 2000 merks for the chalder; but with this quality, That it should be lawful to the tutor to sell them to any who should offer more, the said Charles being always acquainted with the said offer before acceptation thereof. On the 11th of November Pitlurg offers 2010 merks for each chalder, which is ten merks more than Charles's offer; and the tutor closes up the bargain, and gives Pitlurg a disposition. Charles thereon raises a process against the tutor and Pitlurg, for declaring his right to the lands, and for reducing Pitlurg's disposition, as being granted *per crimen stellionatus* against the common law and the Acts of Parliament, discharging double dispositions; and that he being the greatest offerer at the roup, he ought to be preferred.

It was ALLEGED for the defenders,—That though Charles was the highest offerer at the first meeting, yet the tutor was not bound to prefer him to the bargain; for, though he sold it by way of voluntary roup, yet he was not tied to the formal solemnities of the judicial ones: he did, for his pupil's benefit, choose that method, which, by humour and emulation of outbidding one another, might raise the price, but he was not concluded to what should be precisely offered that day; but, by an express condescension of Mr Menzies, he was at freedom, if any greater price should afterwards be offered, like the Roman *addictio in diem*: and so it was, Pitlurg offered more, with which Charles was acquainted, neither did Charles find caution within the forty days prescribed for the price; and it is lesion to the minor to be forced to accept of a lesser price. Neither is there any stellionate in the case, seeing Mr Menzies's offer was resolutive and irritant, unless a higher offer was made; which was truly done; and so the tutor has made no double rights.

ANSWERED for the pursuer,—That, by all the rules and analogy of law, the roup behoved to conclude that day; neither did Charles's consent, if there were any higher offer made, prorogate the roup beyond that day; for if he might accept of a better offer the next day after the roup, why not the next week? and, if so, why not the next month or year? and not only seven years after the roup, but so on to prescription, which insecures all buying at roups. And lawyers say, *interpretatio ita est facienda ut actus valeat, et ut contractus non sit in arbitrio venditoris.* Neither is it sufficient to infer lesion that more was offered; for, 1*mo*, it has been decided, where a bargain has been once concluded at a competent price, it is no ground of resiling, that a greater is shortly after offered. 2*do*, The augmentation here is very inconsiderable, and all spent in this plea; and it is the minor's interest his uncle have it sooner than another; and Pitlurg was *in mala fide* to intrude himself, when he knew it was concluded; and the Lords, in 1700, in the case of *Cuthbert* against *Gordon*, found it relevant to reduce the right of a second, because he then knew of the first disposition. And, as to the want of caution, Charles was always ready to find it; and the tutor ought not to object to this, seeing he has not required caution from Pitlurg.

The Lords declared in favour of Mr Menzies; and found that the tutor, after the elapsing of the day of the roup, could not sell the lands to another; Charles Menzies always finding sufficient caution for the price. And farther, the Lords found, That Pitlurg having offered and subscribed at the public roup, as Charles

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,