The Lords did decern the whole year's stipend to be due to the pursuer; but, as to the case of transplanting of ministers from one kirk to another, the terms of Martinmas and Whitsunday are the legal terms.

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1671. *November* 8. GROTE *against* SUTHERLAND.

GROTE having freighted a ship belonging to Sutherland, and some other copartners, for carrying merchant goods from Caithness to Leith; it being proven that the goods were spoiled through the skipper's fault, in leaving the ship at anchor in the road with one single buoy; and that another ship having run upon her in the night, which might have been prevented if she had had sufficient men on board:

The owners who had subscribed the charter-party were found liable for the damage: but Sutherland and his copartner being both bound to perform the voyage, but not conjunctly and severally, the question did arise, If each of them was liable *in solidum*, or only *pro rata portione*.

The Lords, having considered the case, and in law, that generally, where two or three are only *correi debendi*, and have not obliged themselves conjunctly and severally, then the obligation divides: As, likewise, the case in law, where two or three are obliged *ad factum indivisibile*, any one of them is liable *in solidum*; if the deed may be performed by either of them: as also, that case in law arising from charter-parties, how far *exercitores navis* are liable *in actione exercitoria*. Without determining these cases, they did decern, conform to the libel, against both the subscribers; but did not decide if they were liable, every one *in solidum*, or only *pro rata portione*: for, *de exercitoria actione*, there is a distinction made,—if *Exercitores per magistrum exercent, aut per se*: and, in the first case, where a contract is made *cum magistro navis, (leg. 1. sect. ultima,) omnes exercitores tenentur in solidum*; and the reason is given, *(leg. 2.) ne in plures adversarios qui cum uno contraxerit*. But, where the owners of the ship, *per se navem exercent, proportionibus exercitationis conveniuntur; neque enim invicem sui magistri videntur.—(Leg. 4. eodem tit.)*

Thereafter, upon the 13th June 1672, this case being resumed, each one of the owners subscribing was found liable *in solidum*.

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1671. *November* 9. SAMUELL and ——— HOYLES *against* The GENERAL and MASTER of the MINT and OTHERS.

THE said Hoyles, as executors to their father, having pursued the Master of the Mint, upon a contract, whereby he was obliged to pay to the defunct, monthly, a sum of money for a quantity of copper, which he was obliged to melt for their use, whereof there was two months resting:

It was alleged for the defenders, That the said Hoyles having served ten months, whereof two are only resting, and during the former months, the copper melted by him having suffered great prejudice through his default in not melting it conform to the conditions agreed upon, the damage whereof did ex-

ceed all that was due these two last months; they ought to be assoilyied from payment thereof.

It was REPLIED, That the quantities to be melted being delivered and received, and the said Hoyles, employed, satisfied of his fees, nothing could be retained for any alleged damage as to the quantities, to burden the two last months' payment now craved.

The Lords found, that payment being made without any protestation or instruments taken, and that the money was delivered as monthly payments, and not to an account, nothing could be retained for damage suffered, to affect the two last months' payment; especially the party employed being now dead.

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1671. *November* 15. GEORGE DOLLAS, Writer, *against* NISBET.

IN a double poinding, pursued at the tenant's instance, of a tenement of land; compearance being made for Nisbet, as being infeft in an annualrent of 100 merks, by William Monteith, who was common author both to Dollas and Nisbet, and thereupon craved a poinding of the ground:—Dollas did compear, and produced an infeftment of property of the said tenement, upon a comprising, as likewise an infeftment of an annualrent of 700 merks, prior both to the comprising, and to the said infeftment of annualrent granted to Nisbet; and thereupon craved to be preferred.

It was ALLEGED for Nisbet,—That Monteith, having the right of the comprising disponed to him, the right of annualrent was extinguished by the right of property supervenient; *quia res sua nemini servit;* and, for the right of property founded upon the comprising, it could not defend against Nisbet's annualrent; because the disposition of the comprising to Monteith, the common author, flowed from Nisbet's author, and was affected with the burden of the said annualrent of 100 merks, wherein Nisbet's author was infeft; the said annualrent being reserved out of the disposition of the comprising.

It was ANSWERED for Dollas,—That the right of the annualrent was not extinguished by Monteith's acquiring of the right of property; seeing Monteith was but a singular successor, and might acquire several rights, either of annualrents or comprisings, whereby he might defend himself against any third party; and the infeftment of annualrent being granted by him to Nisbet, only by virtue of the said reservation, contained in the disposition made to him of the comprising, that did operate no more but that it gave him *jus non repugnantiæ:* so that, notwithstanding of the comprising, he might bruik the annualrent of 100 merks, but could not defend against the prior right of the annualrent of 700 merks, seeing the common author did not dispone the said right of annualrent of 100 merks, for all right that he then had in his person, or should acquire.

The Lords did not proceed to give their interlocutor, it being intimated to them, the time of the advising, that parties were agreed; but having considered Nisbet's author's right, that it was not a simple reservation out of the right of comprising, but by an express obligement to infeft in an annualrent out of the