

naked priority of the right sufficient to give preference *in judicio de migrando*. See Hope's Minor Pract. *tit. Of Removings*; and 9th June 1677, *Guthries*.

This is doubted, as *non bene judicatum*. *Vide infra*, at the end of February 1680, No. 42, p. 97. *Vol. I. Page 55.*

1679. WILLIAM SYME and ELIZABETH KINLOCH *against* WILLIAM BAILLIE.

January 9.—MR William Syme, and Elizabeth Kinloch his mother, against William Baillie, brother to umquhile Mr John Baillie, advocate, on the passive titles, for paying a sum whereto she had acquired right by assignation from a creditor of the said Mr John, her [last] husband.

ALLEGED,—She had accepted from Mr John a disposition of all his goods, with the burden of his debts; and so, *ipso momento* that the debt came in her person by the assignation, it, *ipso jure*, became extinct: the same person being both debtor and creditor, *confusione tollebatur obligatio*. *Et quem de evictione tenet actio, eundem agentem repellit exceptio; et frustra petit quod mox esset restitutura*. And it could not reconvalesce by her transferring the right of it to her son, because it was extinct. See Stair, *tit. 11, § 9, Of the Confusion of Obligations*; and *tit. 31, § 17; et supra, 6th December 1678, Cleland*.

2do, ALLEGED,—William was not vitious intromitter with the eighth part of the ship libelled, because he had right to it by a disposition, which purges vitious intromission.—But, in this case, they must make the subject intromitted with forthcoming to the creditors. *Vide thir parties, 31st July 1679.*

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July 31.—In the action, — Syme against William Baillie, (9th Jan. 1679,) the relict having deponed that her disposition from her husband gave her right and title to call in for all his debts, and consequently for this:

At the advising, I ALLEGED,—That her disposition was *donatio inter virum et uxorem*, and so revocable, and revoked *tacite* by the posterior disposition to his brother.

REPLIED,—It was not a *pura donatio*; because she had paid debt equivalent to the benefit she made by the disposition.

The Lords ordained her to count and reckon, that it might appear whether or not she was *lucrata* by the said disposition. *Vol. I. Page 55.*

ANENT TITLE TO PURSUE.

It was doubted, where one pursues an improbation of his father's bond as false, whether he must be served heir before he can have a title to pursue.

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ANENT CHARGES to enter to SUPERIORITY.

A SUPERIOR is not infest, and the vassal is unentered, and desires to enter. *Quær.* what he shall do. Whether shall he only charge his superior to receive him, (which he cannot validly do, nor give him a charter, he not being yet his superior;) or if he be obliged to charge him upon forty days to enter to the su-

periority, conform to the 57th Act Parliament 1474, and then to infest him; and upon his refusal then to apply to the next superior. This is undoubtedly the securest way; and being used, will, in a competition, be reputed equipollent to a past infestment. *Vol. I. Page 55.*

ANENT the SALE of LANDS.

WHERE a man buys land at the Whitsunday, and makes it a Whitsunday's bargain, by paying the price at the term; the buyer, in that case, by the received custom, gets the haill crop that is then upon the ground, or the whole money rent paid forth of the land bought; albeit the seller gets only half a-year's annualrent of the price, from the Whitsunday at which the bargain is made to the Martinmas thereafter: because, though the crop be due betwixt Yule and Candlemas by the tenants, yet commonly masters, when they sell it, make not money of it till the next Whitsunday, and so it comes in to him then instead of the annualrent of the price which he gave out. But if it be a Martinmas bargain, then the buyer gets the half of the crop that is newly separated from the ground, by the same rule, and enters to the labouring for the ensuing year; else he should lose half a-year's annualrent of his money, and get nothing in place thereof. Even as a liferenter dying after Whitsunday gets the half, and, dying after twelve o'clock on Martinmas-day, he gets the whole. *Vide at the end of February 1680. Vol. I. Page 55.*

ANENT CAUTIONERS.

WHERE one or more cautioners, with his own means, and not out of the means of the principal debtor, pays a debt, the Lords have lately ordained the creditor to assign the cautioner payer, not only against the principal debtor, but also against the co-cautioners, who are bound to relieve one another *pro rata*. Yet the contrary had been decided, that a creditor was not bound to assign to a cautioner, but only to discharge him. *Vol. I. Page 55.*

ANENT a LIFERENTER'S RIGHT to TEINDS.

WHERE a woman is liferenter of lands only, without express mentioning of the teinds, and these teinds are valued; some think, by the Act of Parliament 1633 and the posterior acts for valuing teinds, the liferenter may claim these teinds, (without any assignation or right to the decret of valuation,) upon her offering to pay the valued duty; it being allowed to a liferentrix to value the teinds of the liferented lands as well as to the fiars. But if the teinds had been bought before the constitution of her liferent-right, may she draw *ipsa corpora* of the teinds, upon her offering to pay yearly the annualrent of the price that was given for the sale of the teinds? Some think she will not have right to the decret of sale, on that offer. *Vol. I. Page 56.*

ANENT VIOLENT PROFITS.

IN a decret of spuilie of sheep, the violent profits are decerned to be paid

from the day that the spuilie is proven to have been committed. It was inquired whether the violent profits of the goods for that very day whereon the spuilie was perpetrated will be included in that decerniture, and may be sought. It is thought not; because violent profits are penal and odious, and so the time is not counted to run *de momento in momentum*, and commences from that day *exclusive*. Some may argue the interpretation should be strictly taken against the spulyier, *in odium spoliantis*. *Vol. I. Page 56.*

ANENT DONATARS.

By law the donatar is obliged to pay the debt contained in the horning whereupon his gift proceeds: as also, by Act 1621, sums not bearing annualrent do bear it after denunciation of the horning; so that the rebel debtor denounced is from that time liable in annualrent. But the question is, whether or not the donatar is in the same case with the debtor, or in a better case, and if he will be liable for the annualrent due after the horning, and existing upon the denunciation, as well as for the annualrents due before the horning, as the common debtor is. *Qdo*, Since the donatar is bound to purge the debt of the horning, what if he alleged that, by intromission upon his gift, he hath not recovered so much as would satisfy the debt of the horning? I think, as to the debt of the horning, the donatar is like to an executor bound to do diligence, and to assign.

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1679. November 8. FRANCIS FARQUHARSON of FINZEAN *against* the EARL of ABOYNE.

FRANCIS Farquharson of Finzean pursues a declarator against the Earl of Aboyne, to hear and see the Earl discharged to molest the pursuer's fair, and to intercept the cattle coming thereto, upon the pretence that he hath a fair on the other side of the river of Dee that same very week; seeing the pursuer's fair is the oldest, and Aboyne's is only impetrated since *in æmulationem vicini*. See the like case in Dury, June 1642, *Glenfarquhar*. *Vol. I. Page 62.*

1679. November 8. DOCTOR TROTTER *against* JAMES KINNIER.

IN the suspension, Doctor Trotter against James Kinnier in London, the Lords having advised James Kinnier the charger's oath, they found it did not prove his reason of suspension, that the charger had received goods which were sent to the said doctor. Therefore they found the letters orderly proceeded. But, on a bill, assoilyied the doctor from the penalty, but refused to cause reëxamine the charger. *Vol. I. Page 62.*