

relict,—it was alleged for the defender, 1. It being two years since her husband's decease, possession of moveables is a presumptive title. 2. She had confirmed the goods as executor-creditor, upon her contract of marriage, before the gift; which legal diligence, for an antecedent debt before the horning, must have the same effect against the donator as arresting and poinding; and, the goods being in her own possession, she could not pursue herself. The Lords found the second allegiance relevant; but found, that the rebellion cut off the right of thirds, seeing truly the defunct had no goods; and the right of the third is but a consequential interest, in case the husband have goods; although diligence for positive obligations are allowed, for commerce sake, to prejudge donators.

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1683. *February.*

HUME *against* ARNOT.

ONE Arnot, an appriser of lands for a small sum, being year and day at the horn, and his liferent-escheat gifted;—it was alleged for the rebel's creditors, who had adjudged the right of that apprising posterior to the liferent-escheat, That, as to the rents of the apprised lands lying in the tenant's hands, the rebel could only have so much of the mails and duties as answered to the annual-rents of the sum comprised for, in regard the superplus rents ought to be deduced off the stock, which falls not under liferent-escheat; although, if the rebel had uplifted the whole rents from the tenants, these, as being moveable, would have fallen in the single escheat. The Lords found the allegiance relevant, and that the rebel's creditors had right to the superplus.

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1683. *February.* RUSSEL and TAIT *against* GEORGE CLARK.

ONE being pursued for delivery of some merchant-goods bought by the pursuer,—Alleged for the defender, That he, the same day the goods were sold, sent and told the pursuer, that, upon perusal of his books, he had been mistaken as to the price of the goods, and could not sell them so cheap, and so there ought to be *locus penitentiæ* to him, who instantly resiled before the intervention of writ or delivery of the goods. Answered, *Emptio venditio solo consensu perficitur*, without writ; nor was agreed to, that writ should intervene in this bargain. The Lords repelled the allegiance, in respect of the answer.

Page 255, No. 903.

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1682, *December*; and 1683, *March.* ALEXANDER TROUP *against* DAVID CRAIGHEAD.

MARGARET and Helen Wishearts, as heirs-portioners served to John Craig-

head, their cousin-german by the mother's side, having dispoed to Alexander Troup, some tenements of land in Aberdeen; who pursued reduction of David Craighead's service of heir to the said John Craighead, his uncle by the father; David Craighead pursued likewise a reduction, against Troup, of his author's service: in which mutual reductions both parties pretended to the right of nearest of kin to the defunct. It was Alleged against the first retour, That the witnesses adduced for the contingency of blood were neither sworn nor subscribing, though they could write. Answered, *Esto* the depositions do not bear the witnesses to have been sworn, yet they were, *de facto*, sworn; and, though they had not been sworn, the inquest might have proceeded on their proper knowledge, being both judges and witnesses. The Lords ordained the parties to be heard upon the objections against the propinquity of blood *hinc inde*.—*December 1682.*

It was afterwards alleged for the first service, That the inquest having found the party served nearest agnate to the defunct, the same cannot be quarrelled, seeing that would infer perjury in the witnesses, and that the assizers were *temere jurantes*. Answered, That the witnesses adduced in the last service were more pregnant than these in the first; and the depositions in either service are to be considered as depositions made before answer. The Lords, before answer, ordained a probation to be led by commission to the commissary of Aberdeen, which of the two parties served was nearest agnate so the defunct; and afterwards, upon advising the depositions in the report, found the party last served to be the next agnate; and reduced the first service.—*March 1683.*

*Page 148, No. 533.*

1683. *February and March.* JOHN CARSTAIRS *against* ELPHINGSTOUN of QUARREL.

IN the improbation of a discharge, as to the date in October 1652, for verifying an allegiance of minority the time of the granting thereof, one of the witnesses being dead, and the other having deponed that it was his subscription; but that he thought he subscribed it in the year 1651, the harvest after Worcester fight; and that he was not witness to any other discharge between the pursuers and defender at any other time; and, at advising, two other discharges, wherein the deponent was a subscribing witness, being produced;—the Lords perceiving no vitiation in the date, by ocular inspection, and considering the witnesses are not able to remember so ancient dates of writs, and that the deponent was not positive that it was in the 1651, but only he thought so, they assoilyied from the improbation.—*February 1683.*

Thereafter the pursuer craved to be allowed to prove he was *alibi* all October 1652. Answered for the defender, That new articles cannot be received after advising the improbation. Replied, After the direct manner of improbation is closed, by examining of the instrumentary witnesses, the pursuer may recur to the indirect articles. The Lords sustained the reply, and allowed the pursuer to condescend, and consign, which had not been done at first.—*March 1683.*

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