

1688. *July 20.* EARNSLAW *against* SIR PATRICK HUME, Advocate.

A BASE infeftment granted, *in cursu rebellionis*, for a debt prior to the rebellion, not being public within year and day, by possession or otherwise, the life-rent escheat, as the first public right, was preferable thereto; and it was not regarded that the infeftment was made public after the year and day before the gift and declarator; which is considered as to commerce in moveables.

*Page 170, No. 612.*

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1688. *July 29 and 30.* EARL OF BALCARRAS and LERMONTH *against* MR WILLIAM GORDON, Advocate.

A COMPRISING being quarrelled, *ad hunc effectum*, to make it redeemable, upon this ground, That a part of the principal sum was paid before apprising, yet the whole penalty was appraised for, which ought to have been restricted to a due proportion;—the Lords caused trial to be made among the writers to the signet, what was customary in such cases, and recommended to some of their number to settle the parties.—*29th July 1688.*

The writers having reported, that, in their practice, they used always to restrict the penalty proportionally to the partial payments;—the Lords found the apprising to subsist as a security for principal sum and annualrents, and accumulations of annualrents, and a proportion of the penalty; but that the informality hindered the apprising to expire.—*30th July 1688.*

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1688. *July 30.* POWRIE *against* SMITH.

FOUND that the delegation, or innovation of a bond to the same creditor, was not a transaction, although the term of payment of the debt was prorogated, unless there were *aliquid remissum*, some part of the debt given down.

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1688. *August 10.* KIRCONNEL, Donatar, *against* ALLAN.

ALLAN having pursued one Grier before the criminal court, for theft, and got him declared fugitive, and denounced,—upon application to the Exchequer he procured the fugitive's escheat to be burdened with L.300 sterling in favours of himself, in respect he had lost his goods, and been at great expenses in apprehending the fugitive, and leading a probation of the theft. The donatar of the escheat understanding that Allan had transacted his damage by the stolen goods, and taken assignation to L.1000 due to Grier, he applied to the Exchequer; that the moveables fallen in escheat might not be burdened with any sum in favours of Allan; but that he might be left to seek his recourse against Grier's real

estate, *viz.* 8000 merks due to him by Maxweltoun. Answered for Allan, By the Act 26, Parliament 1661, a party, pursuing a thief *usque ad sententiam*, ought to have satisfaction for his lost goods and his expenses. Replied, The sentence against a thief, in such a case, must be upon conviction; and declaring him fugitive is not sufficient. Duplied, The pursuer could do no more, and he did all that was requisite, having charged the thief, and led a pregnant probation in a precognition before the Council, which would have satisfied an inquest; and it was not his fault that the pannel was not convicted, seeing the Council let him out of prison upon caution. The Exchequer inclined to think, that being declared fugitive was not enough, and that the Act of Parliament required a conviction and verdict; but it being informed, that the sum in Maxweltoun's hand was also moveable, the vote was moved, and the L.300 allocated upon Maxweltoun's debt.

This should not be inserted among the decisions of the Session.

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1691. *July.* The CREDITORS of COCKBURN of LANGTOUN *against* JOHN BOWER, &c.

A REASON of inhibition received in a ranking, by way of defence, without reduction.

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1691. *July.* The CREDITORS of COCKBURN of LANGTOUN competing.

OLD Langtoun being obliged, in his son's contract of marriage, to give his son (who was infest in the fee, with the father's liferent of the whole,) access to the lands for 9000 merks yearly, for the entertainment of his future spouse and the family;—the Lords found the provision was real, and preferable to posterior real creditors, in so far as extended to a competent aliment to the lady, which they modified to 3000 during her husband's life; although it was not secured against creditors by any alimentary provision. But most part of the creditors consented.

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1691. *July 8.* The CREDITORS of COCKBURN of LANGTOUN *against* HENRY SINCLAIR.

IN competition of confirmations which are consummated by seisin, the first appending of the seal to the charter regulates the preference, though the confirmation and charter in Exchequer be posterior, unless it appear that the keeper of the seal was *in mora* by an instrument taken against him, and the thing be quarrelled *de recenti*.

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