

was only one nearest of kin at the death of the brother, who entered into possession ; so that, if there had been two or more, and one, without consent of the rest, had laid hold of the goods, the decision would have probably gone otherways. Actores, Andrew M'Douall and Alexander Lockart.

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1743. *July 25.*

——— *against* ———.

[Elch., No. 9, *Inhibition.*]

REDUCED an inhibition at the instance of the heirs of a marriage against a father, who, by the contract of marriage, had bound himself to settle his estate upon himself and wife in conjunct fee and liferent, and upon the heirs of the marriage in fee ; notwithstanding of which provision, the father remained fiar, and the children only heirs of provision ; and though they were creditors, in so far that the father could not make any voluntary or gratuitous alienations to their prejudice, yet the inhibition following thereupon could go no farther than the obligation which was the foundation of it, and therefore could not bar onerous alienations.

This was found, unanimously, upon the report of Lord Elchies.

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1743. *July 25.*

——— *against* ———.

A CHARGE of horning against a husband upon a decret obtained against his wife, before marriage, and to which he was noways a party, was sustained, in respect of the general practice, though, regularly, the husband ought to have been first decerned for his interest, before he was charged.

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1743. *November 9.* OUCHTERLONY *against* HUNTER.

[Kilk., No. 9, *Bill of Exchange* ; Elch., No. 32, *ibid.*]

It was the opinion of the Lords, that there was no difference betwixt a payer *supra* protest and porteur protesting for not-payment or not-acceptance. As to the third point, some were of opinion that the porteur did not lose his recourse, unless the drawer could qualify some damage by the neglect of due intimation. Others, particularly Lord Elchies, thought that the *onus probandi* should lie upon the porteur, who ought to show that the drawer had suffered no damage, otherwise to be barred in recourse ; but the generality of the Lords seemed inclined to establish a universal rule, by which the porteur, if he ne-