duced, because it was given against her, she then being dwelling out of the country with her husband and family, *animo remanendi*, and she being only cited first by the principal summons, upon threescore days, referring it to her oath, and by the second summons, upon 15 days, by warrant of the Lords' deliverance; whereby it came never to her knowledge; she therefore desired to be reponed to the giving of her oath: And the donator replying, that her absence out of the country could not excuse her; seeing she was summoned upon 60 days first, and then, by the Lords' deliverance, on 15 days, conform to the practick and form of citations used against all parties out of the country; against which, to repone parties, it were to invert the whole order of process and parties' securities;—the Lords not the less reponed the woman to her oath, as if decreet had not been given; and, albeit she was not present, they assigned a day to exhibit her to give her oath; and declared what she deponed should not work against the husband, but against herself and her goods, in case she survived her husband, and against the husband after her decease, in case he survived her, in so far as he should be found to meddle with any thing pertaining to her, after her decease, and wherein he should be debtor to her, and no further; and, if the party pleased to choose any other manner of probation rather than her oath, the Lords granted the election to the donator, to choose the same as he pleased, in his option.

Act. Nicolson and Chaip. *Alt.* Stuart and Craig. Gisbon, *Clerk.*

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1632. *January* 25. HELEN SCARLET *against* JOHN PATERSON.

SCARLET pursuing Paterson, as heir to his father by intromission with his father's heirship goods, and so thereby behaving himself as heir, to pay his father's debts; he compearing, and proponing an exception that his intromission was only by virtue of a warrant of the Lords, directed at his instance, craving inventory to be made, that the goods might be made forthcoming to all parties having interest, (and that his meddling with the same upon inventory, as use is, should not make him heir;) according whereunto inventory was made by the judge and clerk to whom the Lords committed the same, and which goods were yet extant in that same state;—and the pursuer replying, that the defender had intromitted with a bible, and an hagbut and sword, and a cod, and a board-cloth, and curtains of a bed, and had used them on this manner, *viz.* by reading on the bible, and retention in his house of the hagbut and sword, and by lying on the cod, and hanging the curtains about the bed, and by spreading of the cloth upon the board; which particulars were not given up by the defender, at the making of the inventory, but were fraudulently left out thereof, at least must be presumed to have been done fraudulently, seeing they are not in the inventory; and the defender having used them as said is, (whereby he cannot pretend ignorance,) he must thereby be liable as heir:—The Lords found this reply relevant; albeit it was not alleged that the defender had disponed or sold any of the foresaid particulars; and albeit the party alleged that the retaining of the same, and using of the same, as was qualified, could not thereby infer him to be liable to all his father's creditors; seeing the omission to put them up in inven-

tory might have proceeded from either his ignorance, or that the same were not then in his sight, or that the clerk might possibly have forgotten to write them up; and they were of so little avail, and of so small importance, that thereby he cannot be made heir; specially seeing he offered to make them all forthcoming, and that they were extant in as good state as they were the time of the inventory. Which duply was not sustained; but they found that they would advert diligently to the probation, anent the deeds of the defender's intromission, and to the very particulars which should be proven to have been intromitted with by him, and the manner thereof; and would thereafter consider, at the advising of the process, if thereby the defender should be found in reason liable as heir, or not: To which time the Lords superseded to declare if he shall be thereby heir, or not, and what it shall import.

Act. Cunninghame. *Alt.* Stuart. Scot, *Clerk.* *Vid.* 15th January 1630, Cleghorn.

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1632. *January* 31. MILLER *against* NISBET and GAVIN LINDSAY.

ONE Miller, having obtained sentence against Nisbet, his father's relict, as executrix to him, to pay a sum owing to him by his father's bond; and thereafter arresting, in Gavin Lindsay's hand, a sum addebted to his father, and pursuing to make it forthcoming;—the defender alleging, that, before the arrestment, the relict, executrix foresaid, had recovered sentence against him to pay to her the sum; which decreet she also, before the arrestment, assigned to a creditor of her husband's, and which creditor also intimated the assignation to him before the arrestment, and to which assignee he has paid the debt acclaimed from him;—this allegeance was sustained; albeit the payment was made, and the discharge reported, after the arrestment, in respect of the other titles before the arrestment, which were a warrant to the payment thereof: And the Lords found it not needful to the party to allege that he paid the whole debt owing by him to the said assignee, to whom the pursuer alleged that there was not so much owing as was owing by him to the defunct; and therefore that the superplus should be made forthcoming to him for his debt. Which was found not necessary; for it was found that the assignee might discharge the debt for nothing, if he pleased, and that the debtor was thereby liberated; and that the pursuer, or any other of the defunct's creditors, had action safe to them against the executrix and her cautioner found in the testament thereanent, to pursue them therefore; but that, as the executrix's discharge did liberate the debtor after sentence, and that she remained thereafter accountable, so her assignee's discharge did the same, without necessity to allege total payment; seeing the whole was totally assigned, as said is.

Vid. 8th March 1632, L. Luss.

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