

January, 1676.

The Advocates debarred being restored upon the 10th of January, our Collection and Observes return to their former orderly channel.

*Advocates' MS. folio 238.*

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1676. January. DOUGALL M'PHERSON *against* ———

A HUSBAND sells land; and obliges himself, in the disposition, to obtain his wife's consent, she being infest therein. She utterly refuses to consent. He is charged, denounced, taken with caption, and imprisoned, on the not implement of that clause. He offers to refund the price he got, *cum omni causa*. QUÆRITUR, When *factum in obligatione deductum* becomes imprestable, at least *valde difficile*, if *venditor fungitur et liberatur præstando interesse*. *Jure non licet a contractu perfecto rescilire, nec est locus pœnitentiæ: initio, est voluntatis, postea fit necessitatis, L. 5. C. de Obligationibus et Actionibus*. If the Lords, *ex jure prætorio*, by a mixture of equity, would reponne them each to their own place, *nescio*. But if he can find caution, or give warrandice in case of the existence of a distress, by her evicting her life-rent upon his decease before her, I think it should assoilye and satisfy, since *dubius est eventus* if ever she has right to that land sold and dispooned. But I think the Lords would not force her to consent, unless the husband offered her as much elsewhere, uncontroverted and clear.

They say, the parties were Dougall M'Pherson and ———

*Advocates' MS. No. 454, folio 238.*

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1676. January. ANENT THIRLAGE.

THE Lords found a clause in the reddendo of a feu-charter, *pro alio omni onere et consuetudine*, sufficient to liberate from astriction to a mill; though neither in the dispositive clause, nor in the *tenendas*, there was the least word of the clause *cum molendinis et multuris*. See the contrary of this decided, in Dury, 17th July, 1629, *Newliston*.

*Advocates' MS. No. 455, folio 238.*

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1676. January. ALEXANDER RITCHIE *against* WAUCHOP of Dreghornie.

ALEXANDER RITCHIE having obtained a decret for poinding of the ground of the lands of Dreghornie, upon an infestment of annualrent furth thereof, (which

*vide supra*, the 24th of July, 1668;) and Wauchop of Dreghornie having granted a base infestment and disposition of his property to his son *in familia*, before the heritable bond; and Ritchie having raised reduction thereof upon the 105th act in 1540, and Dury, 17th July, 1635, *Craighall contra Bothwell*: it fell to be doubted, how the son should be summoned on the reduction, since his father concealed and abstracted him, so that they knew not where he stayed.

The Lords, upon a bill given in to them, inclined to find he might be summoned at his father's dwelling-house, at the Market-cross of Hadinton, within which it lay, at the chamber where he resided when he came to Edinburgh, and at the Market-cross of Edinburgh and pier and shore of Leith, or other such particular places as he was known to haunt, frequent, or resort to formerly, since he was *latitans et vagabundus*; and that they would sustain it as equivalent to a citation given personally, or at his dwelling-house. See Hadington, 7th December, 1622, *Jamieson contra Ker*.

*Advocates' MS. No. 456, folio 238.*

1676. *January.*

ANENT VITIOUS INTROMISSION.

THE Lords, about this time, found, the taking a gift of escheat was not sufficient to purge preceding vitious intromission; unless there be a general declarator obtained upon it, before the intention of the creditors' action against the said vitious intromitter, now donatar. *Vide supra*, 10th January, 1672, No. 292.

*Advocates' MS. No. 457, folio 238.*

1676. *January.*

WHERE improbation is raised of a writ, and the defender in the improbation raises an action for proving the tenor of that writ, and condescends on the *casus amissionis*; the dependance of the action anent the tenor will scarce be relevant to stop certification in the improbation. So Hadinton, *anno 1612, decisione 518; item 592, foliis 59 et 67.*

*2do*, It is QUERIED, If a special service, without a general, gives a man right to heritable bonds, upon which no infestment has followed; and if a special service, *tanquam majus*, contains a general service *sub se tanquam minus*, *L. —. D. de Regulis Juris.*

*3tio*, Of old, and through all the tract of Dury's Practiques, an apparent heir got always exhibition of all writs whatsoever, for inspection *ad deliberandum*; but now the Lords have restricted and explained it, by their decision in 1662, between Tailfer and Shaw of Sornebeg. See it in Craigie's Collection, folio 68; in Stair's System, tit. —. *Of heirs*, § —; and in his Decisions, ———, 1662; *supra*, 14th July 1671, No. 221

*Advocates' MS. No. 458, folio 238.*