duction of the disposition, *ex capite inhibitionis.* Alleged for the relict, That the reduction of the discharge would signify nothing; seeing, the faculty being personal, and not affected by diligence before Dougal's death, it is expired, though there were no discharge of it. Answered, The disposition was an exercise of the faculty, and made the fee Dougal's, so as it might be affected by his creditors. Replied, The disposition is reducible *ex capite inhibitionis*, as being made after the disponer stood inhibited at the instance of the son's relict; and the making the price payable to Sir Patrick Hepburn was a gratification against the Act of Parliament, 1621. Duplied, Though the inhibition should take off the effect of the disposition, yet the disposition was such an act and exercise of the faculty, as hindered it to expire by Dougal's death, as well as if he had uplifted the money, and paid it to Sir Patrick Hepburn. The Lords found the faculty was expired by Dougal's death, and not affectable after his death.

Page 38, No. 176.

1682. *February.* MURRAYS *against* MURRAY.

THOMAS Murray, late bailie of Edinburgh, having granted bonds of 7000 merks to each of his three daughters of the first marriage, in satisfaction of their portion natural, and what they could claim as nearest of kin to their father, which were paid at their respective marriages; and having afterwards granted bonds of 7000 merks also to each of his three daughters of the second marriage, expressly in satisfaction of legitime, &c. and by his testament having left all his six daughters universal legators, as the dead's part; the Lords, 16th July 1678, "found, That the bonds of provision to the children of the second mar-"riage, not being granted *in lecto*, were to be taken off the whole head of the "executry as a debt; and that the half of the free gear, after deduction of "these and other debts, belonged also to the bairns of the second marriage, "and the other half belonged to the bairns of both marriages equally, by the fa-"ther's legacy." It being afterwards found, upon probation, "that the bonds "of provision to the children of the second marriage were granted on deathbed;" the children of the second marriage pursued those of the first, for the half of their father's moveable estate, as due to them for their legitime, upon this ground, That the children of the first marriage were forisfamiliated; and claimed payment of their bonds of provision out of the other half, and that the superplus ought to be divided among the pursuers and defenders, conform to the universal legacy. Alleged for the children of the first marriage: Albeit bonds of provision, granted on deathbed, have only the effect of legacies, they must be imputed in satisfaction of the legitime due to the children of the second marriage, so as they cannot claim both the half of the goods as legitime, and seek the bonds of provision as legacies out of the other half as the dead's part; because, by the civil law, whatever was left by parents to their children, by testament or legacy, was always imputed in satisfaction of their legitime, as appears from the title *ff. de Inofficioso Testamento;* and the reason is, for that the legitime is given as a maintenance to unprovided children, which ceases when they get their portions, and *debitor non præsumitur donare:* but what was given by parents to their children *inter vivos*, was not imputed in the legitime, because parents in

liege poustie are in expectation to gain more means to provide their other unprovided children, which cannot be pretended where the provision is given *in ultima voluntate ;* and yet, even in that case, if it appeared to be the father's will, that the same should be imputed in the legitime, it was allowed ; *l. 25, si non mortis ; ff. de Inofficioso Testamento.* 2. The children of the second marriage cannot seek the benefit of the bonds of provision, except likewise they allow the equal division made by the father in his testament ; because the bonds of provision granted *in lecto* are in effect legacies, and the testament relates thereto, and both are, as it were, *unicus contextus,* and legacies cannot be craved by any that does not approve the testament, seeing *qui approbat non reprobat ;* nor can the universal legacy be otherwise understood than so as to the superplus of the defunct's moveable estate, more than pays the debt and bonds of provision, ought to be divided equally among the children. Again, albeit the children of the first marriage were forisfamiliated by their provision, the renunciation of their legitime in favours of the father himself might be passed from by him, as he has done by making an equal division among all his children by the testament. Answered for the children of the second marriage : As the civil law differs from ours in many things, concerning the division and succession in moveables, so particularly in this, that any provision left to a child, on deathbed, cannot prejudge him of his legitime, unless expressly declared in satisfaction thereof ; just as a legacy being left to a relict, without bearing in satisfaction of her terce, she will get both the legacy and terce ; and if this be sustained in favours of a wife's terce, which is only introduced by our municipal law, much more ought it to hold in favours of a child's legitime, which is founded on the law of nature, as well as upon our law. The brocard *debitor non præsumitur* takes no place here ; for the legitime is not the father's debt, but a legal interest arising to the children, by the division of the communion of goods at his death. And, albeit the father appoints the bonds of provision to be paid out of the first and readiest of his moveable estate, that can only be understood *in terminis juris,* and cannot prejudge the children of their legitime, which the father could not wrong by the testament ; and, had the father's will been never so express that his moveable estate should be divided according to the bonds of provision and testament, it must be overruled by our law and practice, which contradicts such a method ; so that the bonds of provision, having only the effect of legacies, cannot be imputed to the legitime of the children of the second marriage, but they ought to have the half of the father's moveable estates as their legitime, the children of the first marriage having discharged theirs ; and the bonds of provision ought to affect the other half of the moveables, or the dead's part, as legacies. The Lords found, That, albeit the bonds of provision, granted *in lecto,* be of the nature of a legacy, and cannot prejudge the legitime ; yet,—it being arbitrary to him to have granted the said bonds of provision, and having expressly declared that they should be paid out of the first and readiest of his goods and gear, and debts, which imports that the same should be satisfied before the division of the inventory,—they found, That the bairns of the second marriage, accepting of the bonds of provision, must take the same in the order and way of his their father's appointment : and therefore found, That the bonds of provision must deduce off the whole inventory, and that the one half of the surplus, after deduction of the debts and bonds of provision, belongs to the bairns of the

second marriage as their legitime; and the other half, being the defunct's part, belongs to the bairns of both marriages equally by the universal legacy.

Page 119, No. 443.

1682. *February.* JOHN NISBET *against* SIR DANIEL CARMICHAEL.

THOUGH apprising with infeftment, or a charge intervening between a base infeftment and the first term for payment of annual-rents, is preferable to the infeftment of annual-rent, yet a base annual-renter, who had done diligence for possession immediately after the term, was preferred to a comprising without a charge or infeftment.

Page 163, No. 568.

1682. *February.* ANDREW CASSY *against* WILKY.

IN an action at the instance of one Andrew Cassy against one Wilky, for damage incurred by the pursuer in the free use of his cellar in Edinburgh, occasioned by some rubbish of a house the defender was to rebuild there, conform to the town-council's appointment;—the Lords assoilyied from the action.

Page 254, No. 898.

1682. *February* 2. BOWER of KILMADRUM *against* The EARL of MARESCHAL.

AN apparent heir being pursued upon the passive title of *gestio pro hærede*, for having intromitted with some goods belonging to a defunct, which should be reputed moveable heirship, seeing that it is not the best, but any thing the apparent heir takes;—Alleged for the defender, That his intromission was by a warrant from the Lords of Session, empowering him to intromit and dispose of some plenishing for the behoof of creditors, and so was not vitious. 2. The defender was only heir of tailyie, and so had no right to heirship moveable, which falls to the heir of line. The Lords assoilyied the defender from the passive title. *Vide* No. 31, *inter eosdem*, (immediately below.)

Page 7, No. 30.

1682. *February* 2. BOWER of KILMADRUM *against* The EARL of MARESCHAL.

THE Lords found the title of nobility and office of marshall was annexed to the blood, and not *in commercio;* and that the using the title, and exercising the office of marshall, made no passive title.

Page 7, No. 31.