

and extracts out of the kirk-session books, and register ; but ordained them to lead witnesses on their marriage, or cohabitation, and being reputed so, and the time of it ; seeing *testibus non testimoniis est credendum*.

The words were:—The Lords find the passive titles proven by the seasines and writs produced ; but, as to the dates of the marriages, find the same not proven by the testificates produced, not being upon oath : but grant commission to take the depositions of witnesses concerning the time of the marriage of Isobel or Janet Macphersons, and how long they have dwelt with their husbands, and have been holden and thought to be married persons.

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1683. *February 22.* CHRISTIAN SCOT and OLIPHANT *against* COCKBURNS and HARY SINCLAIR.

CHRISTIAN Scot, and Oliphant her husband, against Cockburns, and Hary Sinclair, writer, reported by Boyn. The Lords adhered to their decret, though most unwarrantably extracted ; but restricted it to the fee of the sum liferented, and declared the defenders should not be personally liable ; and allowed them instantly to prove that the whole 10,400 merks was not solely for the price of the jointure, but also for other things.

Then a bill being given in, the Lords, on the 2d March 1683, found that the fee of the 10,400 merks must be affected with the inlacks of the annualrents, due to Christian, of the said 10,400 merks, and also of the 6000 merks, to which they found she had right : and refused to free the petitioners from being personally liable, conform to the former interlocutor ; and that in respect of their compearing and defending without renouncing to be heir ; except, betwixt and that day eight days, they so secure the pursuer in that sum of 10,400 merks, at the sight of the Lord Boyn, as that the current annualrents may be recovered, and that the fee may be affected with the inlacks ; in which case, they assoilvie the petitioners defenders from being personally liable. *Vol. I. Page 222.*

1683. *February 22.* ARNOT of MUGDRUM *against* JAMES BONAR.

THE Lords altered their former interlocutor, finding it only a substitution ; and now they find it to be an absolute disposition. *Vol. I. Page 222.*

1683. *February 23.* HIS MAJESTY'S ADVOCATE *against* The CREDITORS of URQUHART of CROMARTY.

His Majesty's Advocate's declarator of recognition against the Creditors of Urquhart of Cromarty, was this day advised and decided. The Lords find, as to the *first* point, that alienations though without consent of the superior, yet if they be confirmed before the major part be annalyied, can neither recognosce

themselves, nor come *in computo* to make recognition as to any other lands. As to the *second* point, find the confirmations after the major part is alienated, and before the gift of recognition, does secure themselves, but must come *in computo* to make up the major part for the recognoscing of what is not confirmed. *3tio*, Find the *novo-damus* does so secure against the recognition, that all the alienations before the *novo-damus* cannot come *in computo* to make up the ground of the recognition. And find, *4to*, Notwithstanding the infestments whereupon recognition is required be likewise in lands of different holdings, as holding feu or blench, and belonging to different heritors, yet they must be considered as a ground of recognition *quoad valorem* of the whole sums whereupon the infestment was taken, without respect to the relief which may be expected out of those other lands. *5to*, Repel the allegiance, that the infestments were in trust; as it is condescended on, *viz.* that they were in the vassal's charter-chest, and that he retained the possession; except the vassal's dole and fraud were instructed, or that the gift were to the vassal's behoof. To the *6th*, The Lords repel the allegiance founded upon the resignation made by old Cromarty in favours of his son, albeit bearing a confirmation, in what relates to rights made to the vassal, and not to rights made by the vassals. *7mo*, Repel the allegiance founded on the inhibitions prior to some of the grounds of the recognition; as they had done *supra*, in Muirie's case. *8vo*, They find the infestments that were, *habili modo*, extinguished before the course of the major part, cannot come *in computo*. *9no*, They find that seasines intrinsically null are not to be respected as a ground of recognition.

But I think the not registration of the seasine, within sixty days, is not such an intrinsic nullity. Yet see Craig, *Feudorum lib. 3*, in the case of *Mackenzie and Bain*.

This, with John Hay of Murie's case, clears many debates that arose on recognitions. But the fourth and fifth articles of this interlocutor were looked upon as hard, and great stretches of this odious casualty of recognition. The fourth, because if the infestment be also furth of blench and feu lands, why should it be all cast upon the ward lands: only they say, the vassal *fecit omne quod in se erat*, by giving it also out of the ward lands; and that it is likewise out of others, does not diminish the vassal's ingratitude and contempt of his superior. The fifth was grudged at, seeing there cannot be a more pregnant qualification of a trust and a conveyance, than to find a right in a debtor's charter-chest; which presumes it paid and retired, or led to his behoof: unless another way, *quomodo* it came there, by borrowing or stealing it, &c., can be condescended on; as in Fergusson and Seaton of Carriston's case, in 1678.

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1683. February 24. WILLIAM CHIESLEY *against* WILLIAM GORDON and DR TROTTER.

MR William Chiesley, writer, having charged William Gordon and Doctor Trotter, for £100 Scots contained in their bond, on the account of Samuel Chiesly, his brother;—they suspended on this reason, that he had intromitted with more of Samuel's effects than would pay this sum; and he, on oath,