

1685. *January.* LORD MARSHALL and TULLOCH his DONATAR *against* THOMAS CARGILL.

AN obligation to dispoise a vassal's liferent, escheat to himself, not contained in the procuratory and infeftment, found to be only personal, and not to oblige a singular successor in the superiority.

*Page* 166, No. 597.

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1685. *January* 15. SEMPLE *against* SEMPLE of CATHCART.

FOUND that the defender, in an improbation, could not, after the taking of terms, propone this dilator, That the pursuer was out of the country, and no mandate produced. *Vide* No. 551, [Sir Patrick Hume *against* the Vassals of Coldinghame, 8th *January* 1685;] and No. 555, [Oswald *against* Somervell, *January* 1685.]

*Page* 154, No. 554.

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1685. *January* 27. ROBERT WATSON *against* LORD KELLIE.

SIR John Kirk, being cautioner for my Lord Kellie for £10,000, bearing annual-rent, got a separate bond of relief, and being distressed, gave a bond of corroboration to the creditor: Robert Watson, donator to Sir John Kirk's single escheat, pursued a special declarator *against* my Lord Kellie's heirs. Alleged for the defender, That the bond of relief fell not under the single escheat, seeing it ought to be considered of the nature of the principal bond, which was heritable *quoad fiscum*, by bearing annual-rent; 2. Distress, without actual payment by the cautioner, is not sufficient to make the sums of relief to fall to the donator of his single escheat *in causa pene infavorabili*, though a simple distress, *quoad* some favourable effects, be sufficient to make him creditor. Answered, The bond of relief is moveable, seeing it contains no obligation to pay annual-rent formally; and the obligation of relief among cautioners in an heritable bond, is moveable, and, after distress, falls under executry and escheat, &c.; 2. The not actual payment doth not alter the case; for, upon distress, there is *obligatio pura et actio nata*, which falls in escheat as other moveable bonds. The Lords found the obligation of relief did not fall under escheat, unless the rebel had paid the debt; which defence was sustained at the debtor's instance, neither cautioner nor creditor competing. This decision seems irregular.—*Castlehill's Pratt. tit. Escheat*, No. 65.

*Page* 115, No. 433.

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1685. *January* 27. The CASH-KEEPER *against* CAPTAIN M'REITH.

IN a competition between one who was creditor to a rebel before his rebellion, and had, after it, obtained a decret of mails and duties *against* his tenants and