

1687. *December.* JAMES ROOM *against* ROBERT CLELAND.

JAMES ROOM, of London, having charged and denounced James Weir, his debtor, from whom James Cleland got, after the denunciation, an assignation for a debt due before the horning, and Room having, some months after the assignation was intimated, procured a gift of escheat upon his own horning, there arose a competition between him and the assignee. Alleged for the donatar, That, although the Lords have preferred assignees, and the receivers of voluntary rights, where they recovered payment, or got the debt innovated by a new security in their own favours, the competing assignee here can claim no preference, in respect the debt assigned is still unuplifted, and no innovation of the former security made. Answered, There is no rational difference, whether the sum be uplifted or not; for, *jus est plene quæsitum* to the assignees, and the cedent's property altered by the intimated assignation; nor can consumption alter the case, seeing the subject is as much extant, after a new bond, as if the old had remained; 2. Whatever might be pretended, had the donatar prosecuted his horning with ordinary diligence, yet, he having lain off two years before he obtained his gift, it were a disturbance to commerce to find, that, during so long a time, persons might not contract with the rebel, and receive payment of their debt, even by voluntary assignations; and here the donatar could not, as a stranger, pretend ignorance of the horning, which was his own deed. The Lords, in respect of the donatar's so long negligence, preferred the assignee to him. And, if the donatar had insisted upon the Act of Parliament 1621, the same defence of negligence would have been obtruded. *Vide* No. 91, [John Chancellour against Major Baitman, February 1687;] and No. 153, [Laurence Gellaty against Stuart, 3d February 1688.]

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1687. *December.* THOMAS FENDER *against* The MAGISTRATES of HADDINGTON.

IN a subsidiary action at the instance of Thomas Fender against the Magistrates of Haddington, for the escape of a prisoner;—Alleged for the defenders, That Claverhouse's troop, who kept guard in the tolbooth, having, upon the king's birth-day, called for the prisoners to drink his Majesty's health, the prisoner had slipped out in the midst of the noise and confusion, *causa improvisa*, but was searched for and retaken before the pursuer knew of his escape. Answered, If such an excuse were sustained, magistrates might elude all actions of this nature, and creditors would have no security; for the design of imprisonment is, that debtors may be induced to pay, *squalore carceris*. The Lords sustained the defence.

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1687. *December* 6. The TOWN of INVERKEITHING *against* The TOWN of BURNTISLAND.

THE town of Inverkeithing being erected into a burgh-royal by King Robert