the number allowed them; in which case they used to seize upon all the supernumerary and waiff cattle as escheat. *2do.* To prevent the keeping of scabbed or diseased sheep, which may infect the whole; and by which he made no profit; but the country people, who assisted at the search, got a sheep out of every flock, which was one of the perquisites and emoluments of the office; and this was all the spuilyie that was committed.

ANSWERED,---His charter carried no such right. If it had borne a *jus scrutandi*, it might have been a title *ad inchoandam præscriptionem;* but he being infeft in no such *scrutinium*, but only in the property of the hill, he can never introduce any such unusual, unknown, exorbitant servitude upon them; it being none of these known in the Roman law. And though the right of forrestry had sundry special privileges of escheating the goods, that only held where it was expressly granted, being *inter regalia.*

The Lords allowed a conjunct probation, to try the beginning, frequency, and reiteration of the exercise of this power of searching, and the quantity of the emoluments, and if it was only used upon complaints, and how far it has been interrupted; and then the Lords would determine if there was a sufficient constitution for introducing such an extraordinary servitude.

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1697. *February* 19. BRUCE *against* LOW.

IN a reduction betwixt Bruce and Low, on the Act of Parliament 1621, it was ALLEGED,—You cannot quarrel my infeftment, because you were not a creditor till long after.

ANSWERED,---In several cases, posterior creditors have been allowed to reduce; as *9th January* 1673, *Street; 2d July and 4th December* 1673, *Reid.* *2do.* You must be liable *super dolo;* because, though you stood infeft in the fee of your father's estate, yet you communed with me when I came in suit of your sister, and suffered your father to contract for the tocher, and signed as witness to the contract, and now refuse to pay your sister's portion, because you was in the fee before the said contract.

The Lords assoilyied from the reduction, unless he would say, that he had, by some positive act, (beside his concealment,) induced him to enter into the said contract, to make him believe the father was still fiar and undenuded; especially seeing he had reserved his own liferent, out of which the tocher might have been paid.

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1697. *February* 19. The COUNTESS and EARL of ANNANDALE, and SIR WILLIAM DENHOLM of WESTSHEILS, *against* DAVID BAILLIE.

I REPORTED the Countess and Earl of Annandale, and Sir William Denholm of Westsheils, their assignee, against David Baillie, chirurgeon apothecary in Edinburgh, upon his forfeiting a bond of presentation, whereby he had obliged

himself to present Captain Baillie of Hardington, his nephew. The defence was, ---Whatever is competent to Hardington is likewise so to me, I being only his *adpromissor;* and, *ita est,* he would crave the *beneficium cedendarum actionum,* in which case I would recur against you, Westshiels, who are bound as co-principal; and so *confusione tollitur obligatio.*

ANSWERED,—Hardington could not crave an assignation; because his father, by a bond of relief, had declared the debt to be totally his own, and that Westsheils was merely a cautioner; and he, being his apparent heir, could not quarrel this.

Yet the Lords demurred, and thought he might insist for an assignation, unless they instructed that he some way represented his father.

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1697. *February* 26. The CO-HEIRS of the LAIRD of CARNOCK *against* The HEIRS of SIR JOHN NICOLSON of that ilk.

ON a petition given in by the Co-heirs of Carnock, and the Lairds of Greenock, Mochrum, and Balcaskie, their husbands, the Lords had occasion to consider the following case:—They, as nearest of kin to the Lord Napier, ALLEGED, —That Sir John Nicolson of that ilk had been his tutor, and had never counted, and whereon they raised a summons of count and reckoning against his heirs, but had not as yet constituted their debt; therefore craved the ranking of the creditors of Nicolson and the extracting their decreet might be stopt; especially seeing they had served an inhibition on the depending process, which gave them preference to sundry of his creditors.

It was ALLEGED,---The ranking has depended these many years, and was now closed; and if they have been negligent, *sibi imputent;* that ought not *vigilantibus nocere,* nor stop their decreet.

The Lords considered, if it were simply taken out without respect to this interest, it would be cut off; and, on the other hand, it were unjust to put a stop to a decreet of ranking now finished; therefore they allowed the decreet to go forth *quoad* all those creditors whose debts were contracted anterior to their inhibition; but, *quoad* the creditors, whose bonds were posterior thereto, they ordained them to find caution to refund *pro rata,* if the co-heirs should obtain a decreet constituting John Nicolson their debtor on these tutor-accounts; and such as found caution in thir terms, to have out their decreet, and power to uplift their share of the price; otherwise not. Which seemed the best expedient for this case.

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1696 *and* 1697.

1696. *November* 18.---The Lords gave a warrant to apprehend William Rait of Halgreen and one Crokat, for sending a minatory letter to Lord Whitelaw, upon an apprehension that he had opposed a protection he was seeking. They