

raises a reduction and improbation of these deeds, wherein the Lady makes production of what papers she had, but, as to others, contends she was not bound to produce them, nor could any certification pass against them, because her husband having employed Patrick Home writer, to frame and expedite them through the seals, he refused to deliver them up till he were paid the sum of L. 300 Scots for writing and debursements, and for which he had the said deceased Sir John Ayton's obligatory missive letter, acknowledging the account, and promising payment; and therefore Mr William, as heir to his father, ought to pay the said account, and relieve the papers himself, and not turn it over upon the relict.—*Answered*, No law could force him to loose and take out papers that were to his own prejudice, and which he repudiated, having no benefit by them, they being extravagant provisions conceived in favour of herself and her children; by which, and the debts owing to strangers, the estate is so exhausted, that, on the 25th of July last, the Lords gave him an aliment; and though he be served heir to his father, yet it is *cum beneficio inventarii*, and the estate is burdened to the value; whereas the Lady, as executrix, has carried off a considerable quantity of moveables.—THE LORDS first desired to know, whether the writs in Mr Home's hands were more in favour of the Lady and her bairns, or of the heir; and having read the inventory, they found them conceived more in favour of the relict and her children; and therefore ordained her to relieve the same, reserving her action of recourse against the heir as accords; but thought it unreasonable to let the certification go out without allowing her a competent time to get them up out of the writer's hands; therefore superseded extract for two weeks, and what should be produced in that time to be received.

There was another point occurred here, viz. That the hypothec upon writs takes only place where the writer's account is not constituted; but where they have either bond, ticket, or other obligation for it, then it ceases; and here Mr Hume has an obligatory letter.—*Answered*, This additional security was none of his procuring, and therefore he may still recur to the hypothecation law gives him in the papers till he be paid.—THE LORDS thought in this case he might retain the writs till he were paid. Some proposed the dividing the expense betwixt the heir and the relict; but it was decided *ut supra*, reserving her action of relief as accords.

Fountainball, v. 2. p. 294.

1706. June 20. STRCHAN *against* CREDITORS of EDZELL.

A CREDITOR upon an incumbered estate, for a sum far exceeding half its value, pursuing reduction and improbation against all the other creditors, and the question being, how far they were obliged to produce warrants and principal writs, and how far extracts could satisfy a production; the LORDS, considering

No 132.

No 133.

No 133.

the inconvenience on both sides, and what had been the constant form in this case, determined as follows, viz. That if they be writs registered in the books of Session, a condescence on the dates of their registration is sufficient to burden the pursuer with the search; but it is otherwise in writs registrated in inferior courts; therefore the LORDS in the present case found, That certification ought to pass against the last if not produced; but in regard of the importance of the affair, and greatness of the danger, they gave the defender a diligence to cite the clerks for recovery of the principals; and because they were dispersed through many judicatories, they assigned a long day to search them out.

Fol. Dic. v. 1. p. 450. Fountainball.

. This case is No 10. p. 5172.

No 134.

A defender in an improbation having given in a condescence of writs in *publica custodia*, after extracting the act for the first term, but before extracting an act for the second, the Lords allowed it to be received to stop certification.

1713. November 24.

THEODORE MORISON of Bognie *against* The EARL of LEVEN.

IN the reduction and improbation at the instance of Bognie against the Earl of Leven, the LORDS allowed a condescence of writs in *publica custodia*, offered by the defender, after extracting of an act for the first term, before an act for the second term was extracted, to be received to stop certification; because, so long as any term for production was current, the pursuer had time to search whether the writs called for were so registrated, and to get a warrant for transmitting the principals, if he had use for them; and if the writs in the condescence were not upon record, he might extract his act and crave certification.

Fol. Dic. v. 1. p. 448. Forbes, MS. p. 5.

1715. July 28.

SIR LAWRENCE MERCER of ALDIE, and M^{rs} HELEN MERCER his Lady,
Supplicants.

No 135.

THERE being a reduction and improbation raised at the instance of Sir James Elphingston, against the creditors of Dumfermline, and certification ready to be extracted against Sir Lawrence Mercer, one of the said creditors, for not production of a charter following upon his adjudication, and a decret of mails and duties thereon, upon Sir Lawrence's application and offer to show to the clerk of the process the book of the Chancery, where the said decret of mails and duties is registrated; and there being no answers given in for Sir James Elphingston,