No 36.

It was *duplied*, Rankings in order to a sale are not so much considered for affecting the mails and duties, as for distributing the price; and, it being the common interest of the creditors to expedite such processes, they are not in use to object the want of formalities, which a little time can supply; but it was never found, upon any debate or decision of the Lords, that, even in these rankings, the inhibiter could draw a share, unless he did compleat his diligence by adjudging; and, in this case, the question being only for the current mails and duties, to which the inhibition can give Drumcoltran no right, he cannot compete.

"The Lords preferred M'Cartney to the mails and duties, reserving to Drumcoltran to adjudge, and thereafter to pursue reduction as accords."

Dalrymple, No 34. *p.* 42.

1706. *June* 25. Davidson *against* Randel and Robertson.

No 37.
An inhibition being served upon a general charge to enter heir, it was found, that the debt must be specially mentioned in the charge.

Hary Davidson, taylor in the Canongate, in his second contract of marriage, provides 1000 merks to the children of that marriage; and Agnes being the only bairn procreated thereof, her father, by a separate bond of provision, gives her a thousand merks more; but it makes no mention of, nor has any relation to the contract of marriage. On these rights, she adjudges some lands from Robert Davidson, her brother of the first marriage, and that for both the sums in the contract, as well as the separate bond. Thomas Randel, and Margaret Robertson, as deriving right from the said Robert, compete with his sister Agnes, and repeat a reduction of her rights on these reasons; 1*mo*, That she cannot claim both the 1000 merks, but must content herself with one of them; for the father being debtor to his bairns of the second marriage in 1000 merks by the contract, the posterior bond being for that same individual sum, must be presumed to be in implement thereof, seeing *debitor non præsumitur donare quamdiu debet*; and so the first provision is satisfied and absorbed by the last, which comes in the place thereof, and both cannot subsist together; and the current of decisions has run this way lately. In the famous debate betwixt Yester and Lauderdale, 2d Feb. 1688, *voce* Presumption, the Lords found the Lady Yester could not both seek the provision in her mother's contract of marriage, and her bond of provision likewise; and that the second was no augmentation of the first, unless it had expressly borne, that it was over and above what was contained in the contract of marriage, but they behoved to coincide and compense one another as but one debt, especially where the sums exactly quadrate together, as they do here, and was so found, 29th June 1680, Young *contra* Paip, *voce* Presumption. *Answered*, The brocard cited does not answer between parents and children; for their bonds of provision are not to be interpreted in satisfaction of former provisions, but rather to be additions thereto; and Justinian calls these donations *distinc-*

No 37.

tæ liberalitates; and here there was good reason for it; supposing there might have been four or five children of that second marriage, Agnes would have taken only 200 merks of the 1000; and therefore her father gave this additional provision to herself *nominatim*, and does not say that it is in satisfaction of the contract. THE LORDS found the last bond to be in implement of the contract of marriage, and that they were not both due, and therefore restricted the adjudication to one of the 1000 merks, and its annualrent allenarly. The second reason of reduction was, that the inhibition served on the general charge to enter heir was null, because the charge did not specially mention the grounds of the debt now insisted on; and by the late decision betwixt the Lord Ballantyne and Arniston,* it was found such a charge must be special. *Answered*, The condescendence was sufficient, seeing it mentioned debts in the general. THE LORDS found this not to be enough, but it behoved to be special. The third reason was, that the decreet is null, because it does not bear, that *avisandum* was made with the production, and a warrant obtained to discuss the reasons summarily, as all well extracted decreets ought to do, this being an essential part, *inter solennia*. *Answered*, Few decreets bear that *per expressum*; and it is to be presumed the clerks would not omit it, if it were for no more but their own dues; and it could not be enrolled without a warrant. THE LORDS found this omission no nullity, but that it was to be presumed to have been really done. See PRESUMPTION.

Fol. Dic. v. 1. p. 472. Fountainhall, v. 2. p. 337.

1713. *February* 17.

JEAN LIVINGSTON and MR WILLIAM TAIT, her Husband, *against* ROBERT FORREST, Merchant in Edinburgh.

No 38.
Inhibition sustained upon a general charge to enter heir, in so far as concerned debts particularly libelled in the general charge.

IN the reduction *ex capite inhibitionis*, at the instance of Jean Livingston and her husband against Robert Forrest, the LORDS sustained an inhibition upon a general charge to enter heir, given by Mr David Lyon, writer to the signet, to John Robertson, apparent heir to Gilbert Robertson of Whitehouse; in so far as concerned three thousand and fifty merks of principal, libelled in the general charge to be due by Gilbert Robertson to Mr David Lyon, by several bonds produced; and in so far as concerned the annualrents of the said sum, since the date of the execution of the general charge; but not as to preceding annualrents, nor yet as to the penalties in the bonds;

Albeit it was *alleged* for the defender, That inhibitions do regularly proceed upon liquid obligements to pay or perform, granted by, or upon a depending process against the person inhibited; whereas a general charge to enter heir is no obligement of the apparent heir, nor a dependence against

* Examine General List of Names.