

1678. *January.* ANENT DONATARS TO ESCHEATS.

A DONATAR to an escheat having given a back-bond and entered into possession, is pursued by second donatars, to count and reckon, as being paid by intromission; at least might have intromitted with as much: the question is, if he can be countable for ought and should have intromitted, as a first appriser is to a second.

It seems reasonable he condescend upon some obstacle and impediment that hindered him from possessing; for the gift above his own payment is but a trust,—it is *mandatum partim causa mandatarii, partim causa alterius*, viz. of the other creditors, &c. See Dury, 15th December 1626, *Donatar to the Laird of Foulis* his escheat. *Advocates' MS. No. 703, folio 314.*

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1678. *January 11.* RELICT OF JOHN INGLIS OF ELVINGSTON *against* MR JAMES ELEIS OF STANHOPMILNES.

IN a competition between the Relict of John Inglis of Elvingston and Mr James Eleis of Stanhopmilnes, for the gift of the said Elvingston's escheat, the Lords of Exchequer preferred the said Relict to the gift, *qua* creditrix on her contract of marriage; notwithstanding Stanhopmilnes sought it on his own horn-ing, and was the first discoverer of the casualty to the King's Exchequer; because he seemed to be sufficiently secured for his debt *aliunde*, by an infestment; and he did not offer to renounce his infestment.

*Advocates' MS. No. 705, folio 315.*

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1678. *January 11.* ANENT CASTLE-WARDS.

AT Exchequer, Sir John Nisbet was found liable in £4 Scots yearly, as the castle-ward-duty payable for the Castle of Dirleton, and contained in the Chekker rolls. There were only six shires towards the south, and bordering on England, that had these castle-wards.

Dirleton ALLEGED,—These lands, by Gowrie's forfaulture, being annexed to the King's crown, and thereafter given out to the Earl of Kelly free, and without mention of any such duty, it was thereby discharged. Which defence the Lords repelled. *Advocates' MS. No. 706, folio 315.*

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1678. *January 12.* The TOWN of HAMILTON *against* ROBERT HENDERSONE.

IN the mutual reductions and declarator between the Town of Hamilton and Robert Hendersone,

*Imo*, Offered to prove, by the writer's witnesses and trysters, that the sum was blank at the subscribing; which being granted, then by the parties in

whose hands the writs were depositate and consigned, that they were not to be filled up nor delivered, till a count had preceded between them.

ANSWERED *1mo*,—His bond cannot be taken away but only *scripto vel juramento*. *2do*, He will yet instruct he was either debtor to him, or bound to relieve him, for as much as the sum filled up in the bond; and that before the filling up of it.

REPLIED,—These debts must be before the inhibition served against the common debtor, by the Town of Hamilton, else they cannot be allowed.

DUPLIED,—The inhibition is null; because it does not bear a publication at the market-cross where he then staid, *viz.* Rutherglen, within which prison he then was. See Lanfrancus Balbus, *Decisione* 494.

TRIPLIED,—They needed not but at the place where he had *domicilium*, (for in prison he had it not, that being *mala mansio et involuntaria*,) *viz.* at Hamilton, where his wife and bairns dwelt, the inhibition was published.

Newton found it a sufficient publication that was made at the market-cross of the principal burgh of the shire or regality where he had *focum et larem*; the inhibitor proving always, that Nasmith, before he was carried prisoner to Paisley, had his ordinary residence within the regality of Hamilton. And as to the first, ordained Hendersone (for though, *pendente lite*, it was assigned to and it judicially produced, and the rest of the acts of the process carried on in the assignee's name, yet it was declared that assignation should not prejudice us of any defence competent against the cedent, nor of his oath,) to depone if the bond was blank and depositate; and, in case he confess this, then ordains the depositary, witnesses, and fillers up of the sum of the bond, to be examined upon the conditions. See the information of it.

The Lords allowed Hendersone (since the sum was proven to have been filled up without the debtor's knowledge,) yet to instruct the onerous cause, and that Nasmith was his debtor in as much as his half of the bond came to.

*Advocates' MS. No. 707, folio 315.*

1678. *January.* DUNDAS *against* HOLBORN of MENSTRIES.

IN a case of one Dundas against Holborn of Menstries, about some levy-money in 1649; the Lords found, in so old a debt, they behoved to libel resting owing unpaid; because it is presumed such money was presently expended. *Vide supra, July 1669, Bonar against Clelland.*

*Advocates' MS. No. 709, § 1, folio 316.*

1678. *January.* ANENT EXECUTORS and TUTORS.

AN executor or a tutor assigning bonds of the defunct's or minor's, no execution ought to be granted thereon, till the cedents clear their counts, that they are creditors, or have a right; for they may be found paid by their intromission.

*Advocates' MS. No. 709, § 2, folio 316.*