1685. *January and March.* The EARL of MARSHALL and JOHN TULLOCH his DONATAR *against* THOMAS CARGILL.

IN a general declarator of liferent-escheat, at the instance of the Earl of Marshall, and John Tulloch his donatar, against Thomas Cargill of Auchtidonald, vassal to the Lord Marshall;—it was alleged for the defender, That he had a clause in his rights obliging the late Lord Marshall to dispone the casualties of the defender's escheat, or discharge the same as often as it should fall. Answered for the pursuer, That the obligement is but personal in the disposition, and not repeated in the procuratory of resignation and sasine, either expressly or *relativè* to the provisions in the disposition, and so cannot oblige the Lord Marshall a singular successor. The Lords repelled the defence, in respect of the answer; *January* 1685, *and March* 1685. The like, *in terminis*, found in the case of George Davidson, donatar by James Oswald, against John Gilmour. —*March* 1685.

Thereafter it was alleged for Thomas Cargill, That there being a reduction raised of the horning upon which the escheat fell, it ought to be found null, in respect the ground of the charge was an assignation to a matter of £40 or £50 of bygone annual-rents, flowing from one who was formerly denuded by an intimated assignation in favour of another person, and so was *a non habente potestatem;* besides, the decreet was recovered against the rebel when he was minor. Answered for the pursuer, That the escheat is inferred from the contempt of the charge, although the debt be not due; for the defender ought to have suspended. Replied, A horning will be reduced upon a prior discharge, though the party charged may be said to be guilty of contempt and negligence, for not suspending; and from the same reason it may be pleaded, that this horning is null for want of a title in the charger's person. Again, it were hard the defender's liferent-escheat, of 1000 merks yearly, should fall upon the account of a pretended debt of £40. The Lords did not determine this point; but they inclined to repel the reason of reduction.—*March* 1685.

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1685. *March.* DICKSON of HARTRY *against* BROWN.

IN a competition betwixt an arrester of the goods of his debtor dying before the forthcoming, and an executor-creditor who had confirmed these goods; the executor-creditor craved to be preferred, in respect the goods remained *in bonis defuncti,* notwithstanding the arrestment; and the confirmation was the first habile complete diligence. Answered, Though, in a competition of arrestments, the first complete diligence is preferable,—a bare arrestment, which is *nexus realis,* is preferable to a desperate diligence, just as the assignee to a sum would be preferred to one confirming the same as *in bonis* of the cedent, who died before intimation of the assignation. The Lords inclined to prefer the arrester; but the vote was delayed.

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