

ments : And a notary, having given out an instrument that is defective, cannot thereafter give another to supply the defect ; otherwise the question being betwixt the creditors, who had done lawful diligence, and a donatar, it should be in the power of a notary to prefer and gratify either party as he should be prevailed with, either to give out, or not to give another instrument.

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1677. *January 12.*

INGLIS *against* LAWRIE.

SOME of the Lords were of the opinion, that a husband may give validly, during marriage, to his wife, a provision or jointure, where there is no contract of marriage ; but that the wife could not give to the husband, though there were not a contract of marriage ; and that she might revoke any such donation : which appears to be hard and unequal. But this point was not decided.

*Act. Colt. Alt. Dalrymple. Mr Thomas Hay, Clerk.*

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1677. *January 17.* ————— *against* —————.

AN edict of executry being advocated from the commissaries,—a bill was given in, desiring that the advocacion might be summarily discussed ; seeing both nearest of kin, creditors, and the fisk, were concerned that the testament should be confirmed and executed ; which desire the Lords thought could not be granted, in respect of the Act of Regulation : but it was thought a great escape and inadvertency that such advocacions should be passed, seeing the Lords could not confirm testaments : and if any party should be prejudged by any act of the commissaries, it may be reduced upon the head of iniquity. And the Lords thought it was fit that a new edict should be raised ; and, if an advocacion should be sought, the reason should be discussed upon the bill.

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1677. *January 25.*

KER *against* KERS.

A DISPOSITION being questioned, as being made *in lecto*, at least delivered then : It appeared by the deposition of one of the witnesses, used for proving the libel, —that the said writ was subscribed divers years before the disponer was on death-bed ;—and, that the same was delivered before death-bed to the said witness ; and, —that the defunct having called for it on death-bed, for drawing two other dispositions of the lands contained therein, one in favours of the pursuer, the disponer's heir, and the other in favours of a son of the disponer, who was father to the person in whose favours the disposition in question was made. And upon debate amongst the Lords, what should be the import of the said testimony ; seeing the depositar did not declare in what terms the same was given to him

by the disponer ;—whether to the behoof of the said person, in whose favours it was made, or not ; or upon any other account,—for keeping the same, so that the disponer might call for and alter it :

It was found, 1. That the disponer might have revoked the same ; in respect it did not appear, that it was delivered to the behoof of the person to whom it was made.

This decision seems to be hard ; in respect the disposition was now in the hands of the receiver ; so that it was to be presumed that it was delivered, either to him, or to the said other person to his behoof : and the delivery ought to be construed, and presumed to have been, *ut operetur* : and the nature of the act itself imports that it should be to the behoof foresaid : It not being to be imagined, that the disponer had intended to have retained the power in his hands, either to make the said right effectual, or not, he would have given it out his hands.

2. The Lords found, upon the testimony foresaid, That the disponer having revoked the said disposition not simply, but to the effect foresaid, that the said two dispositions should be granted : the pursuer therefore had not right to the whole lands contained in the said first disposition ; but that the same should divide, conform to the said two dispositions.

Mr Thomas Hay, *Clerk.*—*In presentia.*

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1677. February 1. MASTER of RAE *against* SINCLAIR of DUMBAITH and OTHERS.

SINCLAIR of Dumbaith, Sandside, and others, having, in a hostile manner, invaded the Lord Rae's country : There was a criminal pursuit intented against them, for the crimes committed upon the occasion foresaid ; but the said pursuit being taken away by a remission, there was thereafter a spuilie pursued at the instance of the Master of Rae, having assignation from his father, and by his tenants whose goods had been robbed and taken :—And it being ALLEGED against the said pursuit, that it was prescribed ;—The Lords sustained the reply,—That the prescription was interrupted by the foresaid process before the justices.

And again, this day, a summons of spuilie, which had been formerly intented, being produced ;—And it being ALLEGED, That, by the said summons and execution upon the same, the prescription was interrupted ;—

The Lords found, That the same did not interrupt ; in regard it appeared, that the names of the defenders have been blank in the said summons, and since filled up with another ink. And it appeared by the executions, that the same were at the instance of Gray of Arbo, and others, mentioned in the summons, without specifying the said other persons : And the defenders had settled with, and satisfied Arbo ; so that it appeared, that the names of the said other persons had been filled up in the body of the summons, of purpose to be a ground for the said reply. But though the Lords did not sustain the process, as to the effect of giving the pursuer *juramentum in litem* ; in regard the goods libelled, were libelled to extend as to the number of goods, and the damage sustained by