

petition with a public infetment in the year 1668, the debtor, receiver of the discharge, and the creditor who granted it, having acknowledged the date upon oath, and a witness having deponed that he heard the creditor say he was going to grant a discharge about that date, but knew not for what;—the Lords preferred the annual-renter.

*Page 162, No. 582.*

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1681. *November 23.* JOHN AITCHISON *against* SIR PATRICK THREAPLAND.

SIR Patrick Threapland having desired, by his letter, another's creditor to set his debtor out of prison, and promised to keep him, the debtor, in mind to pay at the day; and, if he failed, that himself should pay the debt; upon an assignation, after the day, (no payment being made,) Sir Patrick was pursued as expromissor, and decerned to pay the debt; although it was Alleged, That the pursuer had not, as he ought to have done, given notice, *debito tempore*, after the day, till now that the debtor was bankrupt.

*Page 56, No. 235.*

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1681. *November 3.* SIR MICHAEL NESMITH of Posso *against* His SON, young Posso.

SIR Michael Nesmith's agent having used an order of redemption of an apprising, the instrument of premonition bore, That the procurator's power was sufficiently known to the notary; but the procuratory not being produced to the compriser, upon his requiring a sight thereof, he took instruments in the hands of another notary, that there was no procuratory; and the pretended procurator declared, himself, *ex post facto*, that he had none;—The Lords found, that a *negotiorum gestor* could not use the order of redemption, without a procuratory, and a ratihabition was not sufficient; and so found the order null, though thereby the apprising would be expired.

*Page 64, No. 269.*

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1681. *November 29.* GEORGE HERIOT *against* CAPTAIN BAIRD.

A TEN years' tack being registrat in July 1681, and the tacksman being charged for the rent 1680, and a caption got out in September 1681; the tacksman, while under caption, gave a disposition of his whole corns, goods and gear, for the rests of the crop 1680, and also for payment of the rent 1681, though the term of payment was not come, and containing an obligation to find caution for the rents of all years during the tack, although the tack contained no such obligation. This disposition being questioned as to the two last oblige-

ments as done *ex vi et metu*, when he was under caption, and that this obligation was not the ground of the caption, but only the rent 1680;—the Lords reduced the disposition as to these obligations, *ex capite vis et metus*.

Page 54, No. 228.

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1681. *December.* FLOCKART *against* LORD ROLLO.

MY Lord Rollo, being pursued as vitious intromittor with his father's robes and best horse, at the riding of the Parliament;—he Alleged, That the goods intromitted with fell under escheat by his father's dying at the horning, and the said escheat was gifted, and declared, before commencing of the cause; which ought to purge the vitiosity, though the gift was posterior to the defender's intromission, and he derived no right from the donator. The Lords sustained the allegiance, as relevant to purge the passive title.

Page 6, No. 26.

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1681. *December.* ————— *against* DR HAY, and CAMPBELL *against* CAMPBELL.

FOUND, That, in the case of three brothers, the second and not the eldest succeeds both as heir of line and conquest.

Page 7, No. 32.

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1681. *December.* JOHN GEDDY *against* PATRICK TELFER.

AN adjudication against one Geddy, that was out of the kingdom, being quarrelled as null, for that the citation in the summons was not given upon sixty days at the market-cross of Edinburgh and pier of Leith;—it was Alleged for the adjudger, That the debtor had ratified the decret of adjudication, and so had passed from an informality or nullity therein. Answered, The adjudger gave a back-bond, the time of the said ratification, to allow all things to the debtor that could be acclaimed by law, reason, or equity, which took off the total effect of the ratification. 1. The Lords sustained the ratification to make the adjudication subsist; but that the effect of the said ratification was elided and taken off by the back-bond. 2*do.* The said adjudication was alleged to be null, for that it adjudged for a fifth part more than was due, which was *pluris petitio*. Answered, The adjudger had libelled a fifth part more, not knowing but the debtor might have appeared and produced a progress; in which case, the Act of Parliament allows to adjudge for an additional fifth part; and the clerks, at the beginning, before the import of the Act was well understood, used to extract for the superplus fifth part, even in absence. 2. The Lords, in respect of the clerk's mistake, did not find the adjudication simply null, but restricted it to the principal annual-rent and composition to the superior, without allowing