

was only one nearest of kin at the death of the brother, who entered into possession ; so that, if there had been two or more, and one, without consent of the rest, had laid hold of the goods, the decision would have probably gone otherways. Actores, Andrew M'Douall and Alexander Lockart.

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1743. *July 25.*

——— *against* ———.

[Elch., No. 9, *Inhibition.*]

REDUCED an inhibition at the instance of the heirs of a marriage against a father, who, by the contract of marriage, had bound himself to settle his estate upon himself and wife in conjunct fee and liferent, and upon the heirs of the marriage in fee ; notwithstanding of which provision, the father remained fiar, and the children only heirs of provision ; and though they were creditors, in so far that the father could not make any voluntary or gratuitous alienations to their prejudice, yet the inhibition following thereupon could go no farther than the obligation which was the foundation of it, and therefore could not bar onerous alienations.

This was found, unanimously, upon the report of Lord Elchies.

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1743. *July 25.*

——— *against* ———.

A CHARGE of horning against a husband upon a decret obtained against his wife, before marriage, and to which he was noways a party, was sustained, in respect of the general practice, though, regularly, the husband ought to have been first decerned for his interest, before he was charged.

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1743. *November 9.* OUCHTERLONY *against* HUNTER.

[Kilk., No. 9, *Bill of Exchange* ; Elch., No. 32, *ibid.*]

It was the opinion of the Lords, that there was no difference betwixt a payer *supra* protest and porteur protesting for not-payment or not-acceptance. As to the third point, some were of opinion that the porteur did not lose his recourse, unless the drawer could qualify some damage by the neglect of due intimation. Others, particularly Lord Elchies, thought that the *onus probandi* should lie upon the porteur, who ought to show that the drawer had suffered no damage, otherwise to be barred in recourse ; but the generality of the Lords seemed inclined to establish a universal rule, by which the porteur, if he ne-

glected to give due notification, lost his recourse in all events. To lay the proof of damage upon the drawer, they thought was hard, and the other proof of no damage they thought impossible; therefore found that Ouchterlony had lost his recourse against Hunter. Actores, Alexander Lockart, Charles Maitland.

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1743. November 17. LORD MURRAY against CHARLES ROSS.

[Elch., No. 22, *Tailyie*.]

IN the year 1685 David Ross of Balnagowan, being encumbered with debts, and having no children of his own, did convey to Mr Francis Stuart, second son of the then Earl of Murray, father of the present, and nephew of Balnagowan's lady, and the heirs-male of his body, (reserving his own liferent and his lady's,) the lands of Balnagowan, with strict irritant and resolute clauses *de non contrahendo* and *alienando*. After Mr Francis Stuart and his heirs-male, there is a long series of substitutions, most of them gentlemen of his own name and family, with a clause of redemption in favours of his own heirs-male of his body. In consideration of this settlement, Balnagowan received from the Earl of Murray £10,000 Scots, and Mr Francis Stuart became bound, by the acceptance of the deed, to pay all Balnagowan's debts, provide his daughters if he should have any, and bear the arms and name of Ross.

In consequence of this settlement, apprisings were purchased in, and debts paid by Mr Francis Stuart and his father, till the year 1706, that it was thought proper to alter this settlement, and convey the estate in favour of Lord Ross, author of the defender, Charles Ross. This was done by joint consent of Balnagowan and Mr Francis Stuart, who, upon a recital that Lord Ross had paid to Mr Francis Stuart 63,000 merks, and bound himself to relieve him of all debts for which he stood engaged with David Ross, and of all the obligations he was under by the tailyie 1685, disposed to David Ross in liferent, and Lord Ross in fee, and the heirs-male of his body; which failing, to such heirs as David Ross should name, with a clause likewise of redemption in favours of the heirs-male of David Ross's body. The question was, Whether Balnagowan and Mr Francis Stuart had a power of altering the settlement 1685, and alienating in favours of Lord Ross? The general point was debated, whether the maker of an entail with the first institute could alter?

It was said, that an alteration was expressly contrary to the prohibitory clauses in the entail, and to the Act of Parliament 1685, giving force to tailyies: that, where the prohibitions are intended not to be binding upon the maker, there is a power to alter reserved to him: where that is omitted, it is supposed to be left out *dedita opera*, and the common rules of law must take place: that there is a *jus quæsitum* to the substitutes, as in this case to the heirs-male of Francis Stuart and the after substitutes, which cannot be taken from them without their consent; as in the case of provisions in a contract of marriage to children, which it is thought could not be taken from them even with the