

March 29, 1682,) reported by Boyne. The Lords sustain Hogg's interest to reduce the decret of declarator of redemption obtained against himself, though his title to the lands was as heir to his good-sire, and it was instructed that his father stood infeft, whom he should not have passed over; seeing the decret now quarrelled was obtained against himself. *Vol. I. Page 231.*

1685. *January 14.*—James Hogg of Bleiridryn's reduction against Sir Peter Fraser, mentioned 30th March 1683, was reported by Boyne; and his general service as heir to his father was found a sufficient title whereon he may pursue this reduction.

Yea, this Session, in a case between Falconer of Kincorth and Kinneir, the Lords found a general service was sufficient to pursue an improbation of the rights of lands; though formerly, in the Earl of Hume's improbation against his vassals, the Earl being debarred with horning, they refused to sustain process at Mr Charles Hume, his brother's instance, as assignee, till he were infeft; which decisions are not easily reconciled.

*Vol. I. Page 331.*

See several prior parts of the report of this case in the Dictionary, pages 13,475 and 10,784; and the posterior part of the report in page 15,174.

1685. *January 17.* DANIEL LOCKHART *against* CROMWELL LOCKHART of LEE.

DANIEL Lockhart, as assignee by Lockhart of Heids, charging Cromwell Lockhart of Lee, on a minute of sale, for the price of lands; and the reasons of suspension being ordained to be discussed on the bill:—ALLEGED for Lee,—That he was nominated by the Privy-Council to go to Clidesdale, and administrate the oath of abjuration of the Whigs' declaration to the people there; so his absence being necessary, and *reipublicæ causâ*, no process could be sustained against him, but all behoved to sist during that interval.

ANSWERED,—This was but *causa absentiæ affectata*, sought by himself, and he was but one of more commissioners: and it did not begin for a week; so *medio tempore* this affair might be discussed. Pitmedden demurring how far he might sustain process, and having reported it, the Lords, on the considerations fore-said, repelled the dilator. *Vol. I. Page 332.*

1685. *January 27.* ALEXANDER BOTHWELL *against* ALEXANDER HAY.

ALEXANDER Bothwell having charged Alexander Hay, wright, on his bond for £17 sterling, as the price of some plenishing he was obliged to have delivered to him betwixt and the 1st of January 1685, in respect of his failie to do it:—the reason of suspension was, that he had offered the goods within the days of the charge of horning; and that the delivery of the goods was that which was *principaliter deductum in obligationem*, and the payment of the price

was only adjected *in modum pœnæ*, or as *damnum et interesse* succeeding *loco rei*, and so was still purgeable, *l. 91, § 3, D. de Verb. Obligat.* 2do, The charger's instrument, requiring the goods on the 1st of January, was preposterous and null, and so could not constitute the defender *in mora*, because the 1st day of January being the day appointed for their delivery, that whole day was introduced in favour of the debtor in this alternative obligation, *per § 2. Institut. eod. tit.*

This being reported by Marcus, the Lords found it sufficient to assoilye and exoner the suspender, that he offered the goods before the out-running of the six days of the charge, it being *modica mora*; unless he could prove some real and material damage through not getting them on the precise day.

*Vol. I. Page 334.*

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1685. February 3 and 5. COLQUHOUN OF LUSS against ARCHIBALD STIRLING of CARDEN.

THE Lords advised the two points debated in Colquhoun of Luss's reduction *ex capite lecti*, against Archibald Stirling of Carden, of a bond of 20,000 merks which the last Laird of Luss gave his Lady, who, after his death, married Carden. The defences against it were:—1mo, That the deed was valid, for, after subscribing it, he went both to kirk and market, though the performing any one of the two is sufficient to purge and take off deathbed. 2do, *Esto* it were on deathbed, it depended upon an onerous cause, being granted to her in remuneration of her consent to the sale and alienation of the lands of Lochend to Sir Robert Sinclair, advocate, whereof she was first heretrix, and, the time of the sale, liferentrix; and that the said price went toward the payment of Luss's own debt.

ANSWERED to the *first*,—His attempt in going to kirk and market could not satisfy the law; because it was in coach, only from James Dean's house, at the foot of the Canongate, to the Abbey-church; and this going being done with design to validate the Act, he should have walked on foot; but it was *ultimus naturæ conatus*, and he could not go otherwise, and he stumbled in the very short way to the coach, and his Lady and he were in each other's hands; yea, she held him. Though this was but suitable to his quality, to go in coach, and to lead his Lady; yet, at such a time as this, these compliments ought to be omitted and dispensed with. As to the *second*, This bond does not bear it as granted for that cause; and, *esto* it were, she had got an additional jointure besides, which was remuneration enough. And there was 60,000 merks of proper debt affecting Lochend, which exhausted the price *pro tanto*.

The Lords, on the 23d of February, found the deathbed proven; not that they decided the point in general, that every going in coach should imply supportation and deathbed; for one may have the gout in the feet, and no other distemper. See Gomez. *ad regulam Cancellariæ apostolicæ de Infirmis Resignantibus*. But in Luss's particular circumstances, as they were proven, they found he was supported. They forbore advising the 2d point, till they caused some of their number essay an agreement. But that taking no effect, on the