

the whole from me, but must deduce his share and proportion; because you have precluded me of my relief against him *pro tanto*. But the generality of the Lords thought, that if it was only *pactum de non petendo*, and a discharge without any other onerous cause but favour, he could not be hindered to exact the whole from the other *correus debendi*; but if it was on payment, or receipt of sums of money, more or less, that he could not exact double payment; but thought a gratuitous discharge could not cut off the other's relief. See 10th July 1680, *Leith*.

The Lords, before answer, ordained the discharge to be produced, that they might see whether it proceeded upon payment or not. *Vol. I. Page 582.*

1693. *December 22.* The ADMINISTRATORS of HERIOT'S HOSPITAL *against* ROBERT HEPBURN of BEARFORD.

THE Lords found the pursuer's infestment, in a ground annual out of the tenement called Robertson's Inn, was a sufficient title whereon to call in a reduction and improbation for the rights of property; seeing it was only to this effect, To remove all impediments out of the way why they might not point the ground for his annualrent. But, whereas the Hospital insisted for production of his progress of writs in that tenement from the Bishop of Dunkeld, whom he disclaimed to be his author, the Lords found he was obliged to produce no writs, for satisfying the production in the reduction, but those that flowed from their common author. But, *quoad* the improbation, it was not a good defence that his rights flowed from the Earl of Crawford, as donatar to Crighton's bastardy; and so not from the Bishop of Dunkeld, the mortifier of the pursuer's annualrent; which Bishop he denied was ever heritor of this tenement: for, seeing they offered to improve them as false and feigned, he behoved to produce all upon his peril, else certification would pass. And as to the declarator, sustained it, as accords. *Vol. I. Page 583.*

1693. *December 23.* FLETCHER of ABERLADY *against* The HEIRS of MR WILLIAM FLETCHER, Advocate.

IN a pursuit by Fletcher of Aberlady, against the Heirs of Mr William Fletcher, advocate,—witnesses being adduced by Aberlady to prove that Mr William held courts, and decerned the tenants; and it being OBJECTED, That the witnesses were moveable tenants to the adducer, and so not receivable:—It was ANSWERED, *imo*. That objection was introduced when they could be removed without previous warning; but now, since the Act of Parliament, they having time to provide for themselves, they were not liable to so much impression as before. The Lords repelled this answer. Then ALLEGED,—They had got tacks; and, though it be since their citation to be witnesses, (for it might be more dubious if it were only after their citation in the cause,) yet it puts them out of the hazard of being removed; and so were receivable. The Lords thought it very suspicious, and therefore refused them. *Stio*. ANSWERED,—There is

here *penuria testium*; and, though the process be in Aberlady's name, yet it is for Salton and Blackbaronie's behoof, who were his curators, and liable ultimately to make up this to the minor; and the tenants were nothing to the curators, and so receivable. Yet the Lords still rejected them; but declared, if the process had been at the curators' instance, they would have admitted them. Some were for receiving them *cum nota*. *Vol. I. Page 583.*

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1693. *December 23.* JAMES DICKSON *against* ANDREW DUNCAN'S CHILDREN.

JAMES Dickson, pursuing the children of Andrew Duncan, skipper in Borrowstowness, for a debt, they repeated a reduction, that he was furious when he made the transaction; and a mutual probation being led, the Lords laid most weight on the instrumentary witnesses in the bond; who deponed, That they thought him then rational and sober. And, though others declared that, for ten years, he was reputed mad, and used to run naked to the streets, and threaten to burn the house, yet the Lords found the contrary probation more pregnant, that it was done in a lucid interval; especially seeing it depended on an anterior cause; and there was a decreet of the Admiral's for it, though then suspended; seeing he got down, and paid him no more for his share than he had compounded for with Bonhard and others, partners. *Vol. I. Page 584.*

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1693. *December 26.* ANN DOUGLASS *against* JAMES LANGLANDS, her Son.

MERSINGTON reported Ann Douglass against James Langlands, her son. The Lords repelled his first defence, *viz.* that he was only heir to his brother, Mr George; and the rest of his brethren were the executors, and they were first discussable in law: For they thought the mother, as creditrix, by her son Mr George's back-bond, might insist against both heir and executor, or any of them, as she pleased; reserving their relief among themselves, as accords. The Lords also repelled the second allegiance, That the mother was denuded in favours of her children; and so, they being fiars, were bound to relieve him instantly in this process; and for which he produced a nomination by the mother, dividing the 5000 merks equally amongst the rest of her children: for the Lords considered the mother still as fiar, having, by the back-bond, power to assign it to whom she pleased; and that her nomination was but of the nature of a destination, and *donatio mortis causa*, and so revocable by her; and that it did not appear to have been a delivered evident, seeing it was recovered, by an incident, out of her agent's hands. *Vol. I. Page 584.*

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1693. *December 26.* WILLIAM MAIN *against* Mr JOHN DALLAS and his WIFE.

MERSINGTON reported William Main, son to Mr David Main, against Mr John Dallas, and his wife. The Lords inclined to reponc her against the decreet *in*