

*YULE VACANCY.*

1677. *January 3.* MITCHELSONES *against* MITCHELSONE.

THE three sisters, Mitcheliones, daughters to umquhile Archibald Mitchelione, gave in a bill to the Lords this day, representing that where Matthew Mitchelione, their father's immediate younger brother, did conquest certain tenements, and though they were his undoubted heirs of conquest, yet William Mitchelione, their father's third brother, and immediate younger to the said Matthew, had served himself, before the bailies of Kirkcaldy, as heir of line to him; and they having taken out a brief, and the magistrates refusing to serve them in heirs of conquest to the same lands, therefore craved the Lords would either ordain the magistrates to do it, or the Sheriff of Fife, as the next judge ordinary, where the immediate is contumacious.

The Lords would give it no answer, but verbally to the clerk, that as apparent heirs of conquest they would sustain a reduction of the heir of line's service, the lands being proven to be conquest; or else upon a new requisition of the magistrates, and instruments taken of their refusal, they would, on sight thereof, grant advocacy of the brief from the bailies upon their iniquity to the macers.

Which last method being followed, and the 2d of March the day appointed for serving before the macers, Mr A. Anderson compeared for the heir of line, and alleged the service could not proceed, because one was already served and infest as heir.

ANSWERED,—That could be no impediment, for we opponed the Lords' ordinance, and the macers' commission under the quarter seal; and the two services were not *ad idem*, the one being of an heir of line by mistake, and the other as heirs of conquest; where also it was made appear from Stair's System, *titulo* Of Heirs, § , what he got from his father was conquest, in regard he was not the eldest son.

The macers proceeded to serve, and the inquest served *affirmative*; admitting the other's protestation, as accords.

This was a singular case; for the more ordinary objection against service is *exceptio bastardiæ*. *Vide supra*, No. 508, *in fine*, [November, 1676.]

*Advocates' MS. No. 526, folio 271.*

1677. *January 3.* SIR WILLIAM BENNET of Grubet, *against* JAMES PEUTHERER.

SIR WILLIAM BENNET of Grubet, convenes James Peutherer and his wife, upon the *edictum prætoris*, "*Nautæ, caupones, stabularii*," *ut recepta restituant*, to restore him a cloak he had laid in there, and which, by the merchant's account,

produced, stood him L63, Scots ; she depones she received it, and laid it in a close room, and afterwards gave it out to her servant to be given back.

The Lords advising this oath, found the husband liable ; but in regard it was an used cloak, they modified the value to 60 merks.

*Advocates' MS. No. 527, folio 271.*

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1677. *January 4.* The EARL OF GLENCAIRNE *against* JOHN BRISBANE.

THE Lords, in the cause of the Earl of Glencairne and John Brisbane, found, where a man pays the adequate price of land, and, *ex gratia et favore*, grants to a friend a reversion personal to him, and his heirs of his own body, but nowise to his assignees, that the reversion was not transmissible, and could not be affected, adjudged, nor appraised ; and being for personal respects, could neither accresce to the creditors of him to whom it was granted, nor be communicated to them. *Vide* Dury, 24th March, 1630, Maxwell, and the other quotations there.

*Advocates' MS. No. 528, § 1, folio 272.*

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1677. *January.* ANENT CAUTIO JUDICIO SISTI.

ONE becomes caution *judicio sisti*, to present a boy who is within ten years old, and that without a suspension. Thereafter he suspends. The cautioner being convened, offers to present him with a renunciation of the suspension. *Quæritur*, If this salves the failie ? I think it satisfies the obligation ; especially since you could not have incarcerated him, not being *proximus pubertati*, which begins but at ten and a half, dividing the time with the doctors between infancy, ending at seven, and pupillarity beginning at fourteen, in two moieties.

*Advocates' MS. No. 528, § 2, folio 272.*

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1677. *January.* ANENT TUTORS.

A MAN nominates his wife tutrix to his bairns, and in case either of her death or marriage, names another person ; she refuses to accept, and renounces. *Quæritur*, This being *casus non cogitatus*, and not provided for by the father, if, on her renunciation, *fit locus tutori substituto* ; like the two cases, *voluntatis et impotentia*, in vulgar substitutions of heirs. It is probable there will be room for a tutor-dative ; yet so that if the tutor offer to accept, he *tanquam ex voluntate patris presumpta*, will be preferred to any other.

*Advocates' MS. No. 528, § 3, folio 272.*