

levy money, and the free profit of the company: which was sustained relevant. But the question arose as to the manner of probation: The pursuer offered to prove it by the defender's receipts and subscribed accounts with the commissaries or quarter-masters.

The defender ALLEGED, That, by the known custom among soldiers, the staff-officers count for the whole regiment; whereof every inferior officer receives his share without a discharge; and, therefore, it is only probable by his oath, that he did uplift and retain the pursuer's share; otherwise, the counts with commissaries, or quarter-masters, or collectors of shires, might make all considerable officers liable for the pay of their regiments; which were of dangerous consequence now, after thirty years.

The Lords found the foresaid receipts not to infer a necessity to produce discharges; but that, in regard of the custom, soldiers' payment was presumed, unless it had been questioned *de recenti*; and that it was now only probable, by the defender's oath, that he received the levy money and repaid it not.

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1678. *January 16.* MAULD *against* LORD and MASTER of BALMERINO.

THE Lord Cowper, standing in the right of the estate of Balmerino in trust, disposed certain lands to James Mauld; and, in special warrandice thereof, granted an annualrent out of other lands: And there being a distress, by non-entry, at Pourie's instance, who obtained decret for pointing of the ground of the principal land, James Mauld pursues recourse against the warrandice lands.

The defender ALLEGED, No process; because there was no lawful intimation made, by the pursuer to the defender, of Pourie's play, when Pourie's process for pointing of the ground was pursued: In which case the defender had a sufficient defence to exclude Pourie, *viz.* a right belonging to Mrs Mary Ker, proceeding on a sum whereon inhibition was used before Pourie's right; and, if Pourie's process had been intimated in due time, Balmerino would have raised reduction of Pourie's right, upon the inhibition; which, being repeated by way of defence, would have excluded Pourie.

It was ANSWERED, That sufficient intimation had been made; in so far as the dependence of Pourie's process had been verbally intimated to the Lord Balmerino, or the Master, who stands in the fee of the estate; whereupon James Chalmers, advocate, was employed by them, and did take up and return the process, and was never employed by James Mauld. *2do.* After the decret, a bill of suspension had been given in by Balmerino; wherein Pourie prevailed. The cause was disputed upon the bill; and that because there was no reduction raised by Balmerino upon the inhibition; or, if it was, it was but lately raised, and not yet come to be enrolled.

The defender REPLIED, That, whatever was done upon the bill of suspension, imports not; because the reasons behoved to be instantly verified: but if intimation of the play had been made in due time before the sentence, Balmerino would have had time enough to have raised reduction, and repeated it by way of defence. Neither was a verbal intimation sufficient, without an instrument of judicial intimation; without which parties concern not themselves, and are secure.

The Lords found, That the verbal intimation, though not sufficient alone, yet that Balmerino, being so certiorated, employed an advocate to defend, who appeared, saw, and returned the process,—sufficient: And found it relevant to be proven *scripto vel juramento*; seeing intimations of pleas are ordinary to be made at the bar to the party's ordinary advocate; likeas it was notour that James Chalmers was Balmerino's ordinary advocate.

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1678. *January 17.* PEEBLES *against* The LORD ROLLO.

IN a competition betwixt the donatar of a husband's escheat, and the successors of a wife, to whom he had dispoed his moveables, for love and favour;

It was ALLEGED for the donatar, That a disposition of moveables, by a husband to a wife, could have no effect against a donatar or creditor of the husband; because, if such dispositions could establish the right of their moveables in the wife's person, the same did recur to the husband *jure mariti*: and, therefore, all diligence of creditors who would affect such moveables, as being in the disposal of a husband, must be preferred; for otherwise creditors might be defrauded by such gratuitous dispositions of husbands to their wives.

The Lords found the disposition to the wife not to exclude the donatar of the husband's escheat, except in so far as concerns clothes and ornaments for her person; which were exempted *à communione*.

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1678. *January 18.* The LAIRD and LADY AIRTH *against* The EARL of MONTEITH.

UMQUHILE Captain Bruce having apprised the lands of Airth from the Earl of Monteith, the Earl did ratify the apprising; and the Captain gave a reversion for certain years after the legal. The Lady Airth, daughter and heir to the Captain, and Richard Elphingston of Calderhall, her spouse, pursue a declarator of the expiring of the reversion.

The Earl of Monteith having right from Ker and Shaw, and not as representing his goodsire, ALLEGED, That the Captain's right was satisfied within the time of the legal reversion; at least, before declarator of the expiring thereof; because clauses irritant are ever purgeable by payment or satisfaction before declarator.

It was ANSWERED, That the defence is only relevant as to penal clauses irritant, or temporary reversions, where the granter of the reversion had not a full right before; but here the temporary reversion was merely gratuitous; the Captain having a full right, by an expired apprising, ratified by this debtor; so that the reversion was mere favour, and not penal.

The Lords found the defence only relevant, by satisfaction within the years of the temporary reversion.

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