

be heir or executor to Titius, had right to that money. And here a retouring the blood would do the turn. *Vol. I. Page 6.*

#### ANENT TUTORS.

It is inquired when a tutor or curator is liable for the annualrent of their pupil's annualrents. It is thought not till a year after the expiration of their office, and then they become accountable for the interest of their pupil's or minor's money. But what is the true *laxamentum temporis* here, see it more accurately distinguished in another MS. *Vol. I. Page 6.*

#### ANENT CONJUNCT RIGHT.

WHERE a sum is conceived payable to a man and his wife, and to the longest liver of the two in conjunct fee, *Quær.* if the wife surviving can seek the principal, or has only right to the liferent and to the annual; and if it be provided to their heirs and assignees, if it should be divided between the man and the wife's heirs equally. They say, if it be provided by an heritable security, then *sexus masculinus prævalet*; but if it be a moveable debt, then the wife has right to the fee thereof, if she survive; and if they be both dead, then it divides equally between their heirs. See Haddington's *Prac.* 10th of November 1609, the *Goodman of Carberry* and *Bartilmo Tulloch*; and *Stair, tit. 27.*

#### ANENT REGALITY.

SOME affirm, that inhabitants within a regality cannot decline the Sheriff-court, upon the pretence that they dwell within regality; since the sheriff is the King's lieutenant, and the lord of regality has only power to repledge.

1676, 1677, and 1678. HENDERSON of FORDELL *against* MONTEITH of CARIBBER.

1676. *December 5.*—FORDELL Henderson, as heir of tailyie to Monteith of Randifoord, obtained, at Secret-Council, the charter-kist to be given up to him, and Monteith of Carybber to be dispossessed, and himself put in possession; because the beginning of Carybber's possession was precarious, as a factor, and the disposition by which he acclaimed the estate was suspected of falsehood, and improbation of it depending before the Lords of Session. It was wondered how the Council could find this a competent business for them, it neither being a riot nor *metus majoris tumultus*, but merely civil. When the improbation came to be tried in February 1677, there being only two subscribing witnesses in the disposition, one of them, who had been Randyford's servant, and who was mightily suspected to be bribed, disowned his subscription; which tells us that frequent error of taking the subscriber's own men-servants or sons, to be witnesses in the writs granted by them. Mr George Norvell ever advised that writs, especially if of moment, should be subscribed before famous and honest

witnesses; and yet it is little looked to. Which draws many writs in hazard, mean fellows being easily corrupted to deny their subscriptions.

*Advocates' MS. No. 513, folio 267.*

1677. *November 8.* We have showed *supra*, No. 513, 5th December 1676, that, in the improbation raised by Fordell against Carybber, of the disposition made by Randifurd to Carybber, one of the subscribing witnesses to the disposition, whose name was Cumming, had, upon oath, denied and disowned the same. Thereafter, one Alvas, servitor to Mr Robert Colt, advocate, was dealing with the said Cumming, the witness, to pass from his first disposition, and to acknowledge the subscription; and thereupon drew up the draught of a bill, which he desired him to subscribe, and give in to the Lords. It bore, that he had been practised and influenced to deny his subscription; and therefore craved the Lords would allow him to mend his former deposition. He desired some time to advise upon the bill, and kept it till the Session met, and then gave in a bill showing how he had been dealt with (suborned) to resile from his former testimony; and gave in the draught he had received from Alvas. However, there being great presumptions against him of his prevarication, both he and Alvas are confronted. Alvas denies, at least says he gave him warrant to draw that bill; the other asserted the contrary. The Lords sent them both to prison. At last they were bailed and let out, upon caution to reproduce them, when called for, under the pain of 1000 merks.

Caribber has raised a summons of astruction of his disposition from Randifurd, upon missive letters written by Randifurd to him, showing he would leave him his estate. This is a new sort of summons. *Item, quæritur* if one's first deposition is more to be trusted, or his retractory one. See thir parties, *infra*, No. 708. See the decision of this cause, where Caribber gains it, at the 9th of July 1678, [below.] See *Lanfrancus Balbus, Decisione 509*; *Julius Clarus, in Praxi Criminali, questione 53, § finalis, per totum*, where he shows it is *communis opinio*, if a witness contradict his first deposition, *statur priori examini seu depositioni*.

The Lords, in another case, have ordained this point to be debated in their own presence,—How far a witness, *ex intervallo*, (for *incontinenti* he may,) may seek to rectify and alter his deposition, to the prejudice of him in whose favours he deponed formerly, to whom there is a *jus quæsitum*, which ought not to be taken away from him without his own consent; *L. 11 D. de Regulis Juris*; and whether the first or second deposition is most prevalent; and if the second derogates, as in laws, testaments, contracts, &c. See *Cavalcanus de Testibus*. For a reprobator, it does not always convel the testimonies to this effect, to rescind the decret founded on those testimonies, as its probation. See Mackeinzie's Pleadings, *Sir John Whytfoord of Milneton and the Lady*.

*Advocates' MS. No. 650, § 6, folio 305.*

1678. *January 12.*—Monteath of Caribber and his son are pannelled before the Criminal Court, by Henderson of Fordell, (see of this, *supra*, [No. 650,] *sect. 6.*) for suborning Cumming, by the aid of one Alves, to depone falsely. The Justices laid it over till the civil prejudicial action betwixt them, depending before the Lords, were discussed. *Advocates' MS. No. 708, folio 316.*

*July 9.*—The Lords advised the improbation pursued by Fordell Henderson, against Monteith of Caribber, of the disposition made by Randiford, of his estate to Caribber. (See 8th November 1677.) The Lords assoilyied from falsehood, and sustained the disposition, and found it probative, unless Fordell would offer to prove, that, at the time of Randiford's death, it was an undelivered evident,

and lying among his papers ; for it contained no clause dispensing with the not delivery. Fordell was so confident, that he hoped the Lords would find the disposition false, upon Cumming denying his subscription ; (but the Lords were persuaded that Cumming did prevaricate ; ) and the least he promised himself was that it should be found a writ null of the law, as only standing upon the testimony of a single witness. This made him bestow very liberally ; which he was the better enabled to do, that the Secret Council had given him the possession *medio tempore* ; and the Lords had not ordained any restitution of the bygone fruits, reputed them as *bona fide percepti et consumpti*, on the Council's warrant. This interlocutor surprised many as unexpected. See the full case in the Informations. Vol. I. Page 6.

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1676 and 1678. CATHARINE MITCHELL *against* THOMAS LITTLEJOHNE'S HEIRS.

1676. June 17.—CATHARINE Mitchell, relict of John Reid, merchant in Edinburgh, being remarried to Thomas Littlejohn, tailor ; who, within half a year, taking sickness, he grants her a bond and declaration for 600 merks, during her lifetime, in case the marriage dissolve within year and day. He dying shortly after, the said Thomas his heir, and other children, with concurrence of Andrew Littlejohn, their tutor, pursue a reduction, before the Lords, of this her yearly liferent provision : *1mo*, Because as he died within the year, and so no jointure was of the law due, so the said declaration and bond, dispensing with the said law and consuetude, was granted *in lecto ægritudinis* ; and though he came to kirk and market, yet he was supported ; and was sick of a lethargy, and was not *compos mentis*, neither as to memory, nor judgment, nor bodily health, when he did it. *2do*, It was a *non habente potestatem* : he could not do it in defraud of his children of the first marriage, who were anterior creditors, by virtue of their mother's contract of marriage, and a clause of conquest therein contained, providing the haill means and estate he should happen to acquire *stante matrimonio* to the bairns to be procreated of that marriage ; after which he could make no donation to a conjunct person, destitute of all onerous cause, in prejudice of these children their *jus quæsitum*.

ANSWERED to the *first*,—Offers to prove he was *in liege poustie*, when he subscribed it, and sound in his intellectual faculties, and that he came to kirk and market unsupported. As to the *second*, A naked clause of conquest does not hinder nor restrain a father from disposing on a moderate jointure to a wife who brought somewhat with her ; he being of an opulent fortune, and not incapacitated by inhibition, or other diligence done upon that clause of conquest.

The Lords, before answer, ordained both parties, *hinc inde*, to prove, both as to the defunct's going to kirk and market supported or unsupported, and as to his capacity and understanding what he was then doing. For this, *vide supra*, 20th February 1670, the Lord Balmerinock *against* the Earl of Airly and Lady Coupar, and the many citations there. *Item*, 11th July 1669, Shaw *against* Calderwood.

When the probation came to be advised, in regard the supportation was mentioned by some of the witnesses, and the acts of sanity were not so fully proven,