

thought this was no *ultimus hæres*, seeing infestment never followed on that contract.

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1687. July 6. JOHN BALLANTINE *against* GRAHAM'S CREDITORS.

JOHN Ballantine, in the King's Guard, a papist, his reduction against the creditors of Provost Graham in Dumfries, is debated *in præsentia*. ALLEGED, —He could not reduce their rights *ex capite inhibitionis*, because they had right to a recognition of the lands by Provost Graham's taking base infestment therein when he was breaking; and though the Act of Parliament 1686 does statute that inhibitions shall not be prejudged by recognitions, yet that is but *lex nova*; and the law before that was, that the grounds of the recognition could not be quarrelled by anterior inhibitions, the King not being concerned therein; and it was so found *supra*, 16th December 1680, *Hay*. ANSWERED, —The cases differed; for, 1mo, This inhibition was not against Graham, who incurred the recognition, but against M'Brair his author. 2do, Before the recognition, the pursuer had raised a reduction *ex capite inhibitionis*, and so *res erat litigiosa*; and there are none in his circumstances, and so no hazard of a preparative; and the Act of Parliament clears it *pro futuro*.

On the 7th of July, the Lords, on the specialties of the case, reduced, *ex capite inhibitionis*.

Then it was alleged, his bonds were null, being subscribed at several places, and there were only two witnesses for all. 2do, By this inhibition, he had received partial payments from sundry other creditors whose rights he had quarrelled.

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1687. July 8. DALMAHOY *against* ———.

IN the case of Mr Dalmahoy, married to the Lady Lufnes, it was debated, whether his son could have a moveable heirship, seeing he was neither prelate, baron, nor burgess, but had only some heritable bond by secluding executors, and was a *civis honorarius* by having some burgess tickets. But I find Stair, *tit. 27, § 9*, adduces decisions where neither of thir two were found sufficient to give heirship.

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1687. July 8. ANENT the PRIVILEGE of JOINTURES.

IT has long passed among lawyers as a brocard, that wives' jointures have a privilege; and therefore the Commissaries prefer them *in mobilibus*, (for, in heritage, diligence carried it,) when they seek to be confirmed executors-cre-

ditors to their husbands on their contracts of marriage, to the exclusion of other creditors.

The Lords are now beginning to doubt of the legality of this, our law giving no *hypotheca pro dote vel donatione propter nuptias*; and therefore have appointed it to be heard in their own presence, in the case between the *Earl of Forfar* and one *Menzies*, the relict of one of his tenants, that they may examine it fully. *Vide 17th February 1688, Keith. Vol. I. Page 465.*

1684, 1685, and 1687. HEPBURN of HUMBY'S CREDITORS competing.

1684. *December 10.*—SOMERVELL of Drum against Adam Hepburn of Humby, is reported by Marcus. Humby being debtor to Drum's grandchild, by George Graham's daughter, they arrest the price of Crighton sold by Humby, in Sir William Primrose's hand. He ALLEGES,—That he had raised a multiplepointing, wherein he had called all Humby's creditors to debate their rights; and the infestments, and other diligences, are all ranked, and the price of the lands is exhausted, and destinated already for payment of other creditors. ANSWERED,—That was only done by collusion; and he could not gratify and prefer one to another, who was preferable in diligence.

The Lords ordained Sir William to depone *quomodo* the price was exhausted and applied, and what was yet in his hands unpaid. *Vide 9th December 1685. Vol. I. Page 319.*

1685. *December 9.*—Between David Hepburn of Randerston, and the creditors of his brother Humby. When Humby sold the barony of Creighton to Sir William Primrose, there was a destination of the application of the price (anent which, *vide 10th December 1684,*) drawn up by umquhile Sir John Cunningham, and Sir Robert Hepburn of Keith, appointing the price to be paid to particular creditors therein mentioned, whereof some were but personal creditors: and Randerston, on the faith of the destination, having paid them, and others having arrested the price, and the competition arising betwixt them; the Lords found, as Humby could not sell the lands without consent of his interdictors, so neither could he prefer one to another; and therefore found the arresters preferable to these personal creditors named in the destination. And though it was offered to be proven by famous witnesses, that the disposition was only depositated in Sir John Cunningham's hands in those terms, till the creditors in the destination were paid, yet, he being dead, they found it only probable *scripto vel juramento*. *Vol. I. Page 383.*

1687. *July 8.* In the competition betwixt the deceased Adam Hepburne of Humby's Creditors anent the price of the barony of Creighton, sold by him to Sir William Primrose, as mentioned 9th December 1685, Patrick Murray of Livingston, his son-in-law, is preferred on his Lady's right on that estate for 35,000 merks; and, on Carse's report, the Lords find her restricting her infestment, which affected both the lands of Creighton and Humby, to the lands of Humby only, as also her restricting the sum to 30,000 merks, by accepting a