1687. *July* 23. GEORGE MARISHALL *against* ALEXANDER CRUIKSHANK.

IN a case between George Marishall, tailor in the Canongate, and Alexander Cruikshank, about the liferent-escheat of Mr Andrew Burnet of Wariston, advocate, it fell to be queried, whether a creditor, who has inhibited before the bond whereon the liferent-escheat falls, can reduce the said ground of the horning, so as to be preferred to the donatar. It was alleged, the King, *quoad* his casualties, was founded *in jure communi*, and was not concerned in the diligences of creditors; and, till the late Act of Parliament in 1686, inhibitions did not prejudge recognitions. But, in equity, the creditor-inhibiter seems preferable. *Vol. I. Page* 469.

1687. *July* 23. ANENT OBJECTIONS to WITNESSES.

ONE gives in a bill, representing some legal objections he had against witnesses who were adduced against him, and which he could not instantly prove; and therefore craved a diligence for leading witnesses, who would not ultroneously appear to prove his objections.

The Lords granted a diligence; though these objections used to be summarily and instantly verified by the parties' oaths, or otherwise.

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1687. *July* 23. AUCHINLECK of BALMANNO *against* SIR THOMAS MURRAY of GLENDOIK.

AUCHINLECK of Balmanno's process against Sir Thomas Murray of Glendoik was advised, whether the commoners between them should be examined as to the terms of the bargain of sale, and the price, as was done in the Duchess of Lauderdale's case against the Earl of Lauderdale.

The Lords were equally divided on it, and the Chancellor superseded to give his vote, but sent for the commoners, and tried what they could say.

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1687. *July* 23. ELIES of ELIESTON, Petitioner.

MR John Elies having infeft his son in Elieston, to be holden base of himself, and being now dead, and so his son succeeding also to him as heir of tailyie, and serving himself heir; he doubted how to be infeft, being both superior and vassal, and if he could direct precepts to infeft himself.

On a bill given in to the Lords, they directed precepts to the Sheriff of the

shire to infeft him. But thereafter the Lords found he needed no new infeftment, but that his old one reconvalesced, and his retour consolidated the property with the superiority without a seasine. *Vol. I. Page* 470.

1686 *and* 1687. The EARL of SOUTHESK *against* SIR JOHN SINCLAIR of LOCHEND and the EARL of BROADALBINE.

1686. *March* 3.—THE case of the Earl of Southesk against the Earl of Broadalbine and Sir John Sinclair of Lochend, being reported by Kemnay; the Lords repelled the first allegeance proponed for Sir John, *viz.* that his father's back-bond is not produced, in respect of the reply that Sir John's father accepted of Broadalbine's back-bond, which was recovered out of Sir John's own hands by an exhibition before the sheriff. And, as to the other allegeance against the relevancy of the summons, the Lords declared they will hear the parties' procurators thereupon *in præsentia;* for it was alleged, that Broadalbine's back-bond, mentioning Sir Robert Sinclair's back-bond, did not prove, unless Sir Robert's back-bond were produced, *quia non creditur referenti nisi constat de relato, et falsa causa seu demonstratio non nocet;* as if I should leave Titius £100, because he procured me such a gift from his Majesty, and find afterwards it was not he, but another, he cannot claim it. Yet, here, the Lords found it sufficient, *quia verba narrativa fidem faciunt contra proferentem et acceptantem.*

And, on a new hearing on the 17th of March, the Lords found Broadalbine's back-bond instructed against Sir Robert and Sir John Sinclair, but not against Broadalbine, till Sir Robert's back-bond were produced. *Vide* 25th November 1686. *Vol. I. Page* 407.

1686. *November* 25.—The case of the Earl of Southesk and Sir John Sinclair, mentioned 3d March 1686, was heard in presence. It was ALLEGED,—That the clause in Sir Robert Sinclair's back-bond to the Earl of Caithness, that, he being paid and Walter Innes of Orton relieved, he should denude, did not tie him to see Orton paid, but was of the nature of a perpetual reversion, and that he should not transmit it without the burden of Orton's debt; which he had done; but did not hinder him to take payment to himself. ANSWERED,—The clause was copulative, and could have no sense, but would be frustraneous and elusory, unless it had been a security for Orton, who, by relying on this, having forborne to do diligence, or to comprise, must not be prejudged; and that the nicety of the Roman law, *quod non licet alteri stipulari,* (which was introduced *ut unusquisque sibi acquirat, non alteri,*) was abrogated by the equity of the canon law and our customs; whereby clauses might be inserted in favours of a third party, though not a contractor.

The Lords having advised this debate, on the 10th of December, they repelled the allegeance proponed against the pursuer's title, though this relief was not *expressim* comprised; *omne jus* in general being enough. And found, that the comprising led against Innes of Orton gave Southesk sufficient interest to insist in this process; but find that Sir Robert Sinclair's disponing the right