No 115. agreed that his name should have been filled up in the blank. THE LORDS did repel the allegeance unless he would offer to prove the same, *scripto vel juramento* of the pursuer, that he knew the same so be true. 2*do*, It was *alleged*, That the pursuer offered to purge the inhibition and comprising, the pursuer disponing the right thereof to the defender. THE LORDS did find it sufficient that the pursuer had offered to renounce, and found that he was not obliged to dispone a comprising, of which the legal was expired. 3*tio*, It was *alleged*, That the pursuer's bond was conditional, viz. that the common debtor should pay the sum of money therein contained, the Lady Lucy obtaining the common debtor infeft in his lands by the Marquis of Hamilton his superior; which condition not being purified before the inhibition, it could not be any ground of reduction of the defender's right, which was for a debt prior to the inhibition; but could only take effect after the condition of the bond was purified. It was *replied*, That the condition of the bond was purified, in so far as the pursuer having charged the common debtor, who did suspend upon that same reason, that the bond was qualified as said is, there was an abatement given of 2500 merks of the sums contained in the bond as damage and interest for not fulfilling of that condition, which was *factum impræstabile*; and as the common debtor might have discharged that, it being satisfied by a judicial sentence, the LORDS found that it did purify the condition, and did make the inhibition to subsist as to any posterior heritable right, albeit for a debt prior thereto; upon this reason, that the bond was a personal bond, and that the debtor might discharge any part or condition thereof, he not being inhibited nor his right affected by any prior diligence at the instance of a prior creditor.

Gosford, MS. No 297. *p.* 128.

1683. *February* 9. TROTTER *against* LUNDIE.

No 116.
In a reduction *ex capite inhibitionis* against real rights, found, the inhibition was purgeable upon payment of the principal annualrent and penalty, without respect to accumulations and Sheriff fees, contained in an apprising led on the inhibition.

IN the action of reduction, Trotter against Lundie, wherein Trotter having pursued a reduction upon an inhibition served against his debtor, before Lundie obtained his right of wadset from him, and Lundie having *alleged*, That he could not reduce his right, because he offered to purge by payment of the debt, which was the ground of the inhibition; and it being *replied*, That the same was not purgeable, in regard there was a comprising led thereupon, which was expired; and it being *duplied*, That the comprising could not be drawn back to the inhibition, so as to have the benefit of an expired legal, in regard the defender's wadset intervened betwixt the inhibition and comprising, and so was preferable to the comprising as a real right, and that the ground of the inhibition was always purgeable by payment; the LORDS found, that, notwithstanding the comprising was expired, yet, that the inhibition was always purgeable by payment of the principal and penalty contain-

ed in the bond, and refused to make the defender liable, either for the accumulated annualrents, or Sheriff fees, contained in the comprising. No 116.

Fol. Dic. v. 1. *p.* 476. *P. Falconer, No.* 48. *p.* 26.

*** Harcarse reports this case.

AN inhibited person having granted a wadset, and the inhibiter having thereafter comprised upon the ground of his inhibition, and the apprising expired, the wadsetter offered to purge the ground of the inhibition.

Answered, That the expired apprising, upon the ground of the inhibition, hindered it to be purged; and the wadsetter was in *mala fide* to contract with the debtor, after the command of the inhibition, and ought to have redeemed the apprising before expiring.

Replied, The inhibition being only a diligence, and no real right, it secures only the principal sum and annualrents due *per* bond, and *in tanto* the comprising and inhibition concurring will receive satisfaction; but the accumulated annualrent and Sheriff's fee, which only fall due by the apprising, cannot be sustained in prejudice of the wadset, a prior public right; nor was the wadsetter obliged to redeem the apprising, which was posterior to his right; but if the appriser will purge the wadset, his apprising may have its full effect against the debtor and posterior rights.

THE LORDS found the inhibition purgeable by payment of the principal sum and annualrent, notwithstanding the expired comprising. In this process, the execution of the inhibition being quarrelled for not bearing three oyesses, the Lords were divided about it, and the votes ran equally for sustaining and annulling the same; and the Chancellor did not interpose his casting vote.

Harcarse, (INHIBITION.) *No.* 631. *p.* 173.

*** Fountainhall reports the same case.

1681. *June* 21.—THE LORDS, on Newton's report, sustained an inhibition that wanted three several oyesses, because the inhibiter offered *positive* to prove by the witnesses, that the three oyesses were actually adhibited and used. Yet the LORDS, at other times, have found the contrary, that this solemnity was not suppliable by the witnesses, when omitted.

1682. *November* 29.—IN the case of Lundy against Trotter, (mentioned June 21st, 1681,) the LORDS demurred to annul an inhibition which wanted the three oyesses, but bore lawful publication, which imports it was read; seeing it was offered to be proved by the witnesses inserted, that the three oyesses were truly adhibited; but this being wanting as it stands registered, it were very dangerous to dispense with it; and to admit such a supplemental probation were to render registers superfluous; for one may buy, notwith-

No 116.

standing of an inhibition, if he sees it has nullities, by looking at the register. This case was to-day voted; and there being sixteen Lords, Ordinary and Extraordinary, within, besides the Chancellor, and the Lord in the Outerhouse, and two absent, they were equally divided, eight against eight; so it came to the Chancellor's casting vote, which happens not oft; and he craved time to deliberate and think upon it, as a leading important case. There were nine scores of inhibitions produced, which had the same want and defect; so that, if it were annulled, all these diligences would fall *in consequentiam.* As this is an argument *ab incommodo*, so we see as great inconveniencies on the other hand, to dispense with these ancient solemnities, (for the *hoesium* is from the Norman law,) or to prove them *ex intervallo*, though they signify nothing in themselves, nor tend, in the least, to certiorate the lieges. *Quid juris* if the Chancellor decline to give his suffrage? *An in pari casu reus est absolvendus, ut actus valeat*, or are they to be forced to agree?

1683. *February* 9.—IN the question betwixt Lundy and Trotter, (mentioned 29th November, 1682,) reported by Pitmedden, the LORDS found the sum of the inhibition purgeable and redeemable, notwithstanding that upon the bond, which is the ground of the inhibition, there was a comprising led, and the same was now expired; which, in effect, was to redeem the expired comprising: But the wadsetter who competed here, and offered to pay the sum in the inhibition, was preferable to the comprising; only the inhibition, being prior to his right, straitened him. And the LORDS, after balancing the case, found this more equitable than the contrary decisions, on 24th February, 1666, Grant, No 114. p. 7045.; and 8th July, 1670, Lady Lucy Hamilton against Pitcon, No 115. p. 7046.; observed by Stair, which were but *una hirundo:* And found the sums in the comprising behoved to be paid, but not the accumulation of the annualrents due and apprised for at the time of the comprising; and found the said comprising could not be drawn back to the inhibition, in regard the wadset foresaid had intervened betwixt them.

Fountainhall, v. 1. *p.* 143. 197. 217.

1684. *February* 1. CRICHTON *against* ANDERSON.

No 117.

A reduction *ex capite inhibitionis* has no effect, except from the date of the sentence.

ONE Crichton, a creditor to William Anderson, having arrested rents of lands belonging to the debtor, and also got a corroboration of his debt from George Anderson, to whom William, his father, had disponed these lands; John Anderson, another of William's creditors, did afterwards also arrest the rents; and, in a competition of forthcomings, Crichton craved to be preferred, in respect he was the first arrester; and the common debtor being denuded in favour of George, who was infeft before John Anderson's arrestment, the duties belonged to George, who was not debtor to John Anderson.