

HENDRY FAIRBAIRNE, and The JAILOR of CANNONGATE, *against* BARTILL
KELLO.

HENDRY Fairbairne being warded, at the instance of Bartill Kello, in the tolbooth of the Cannongate, for not paying of the sum of 1000 merks, contained in the said Hendry his bond made to him, he escapes out of ward, and leaves the country. Bartill obtains decret against the bailies for payment of the said sum. The bailies recover decret, for their relief, against Thomas Robertson, their jailor, and his cautioner. For both their reliefs, a summons is raised, at the instance of the said Hendry, for reduction of the said bond granted by him to the said Bartill, which was the ground of the said action, *ex capite minoritatis*. After citation made to the said Bartill by the said summons of reduction, Bartill raised summons against the said Hendry, to give his oath *de calumnia*, whether he had just cause to insist; with certification he should get no process. Bartill proponed, likewise, an exception, that the said Hendry was major, and summoned the said Hendry to give his oath *de calumnia*, if he had just cause to delay his execution. After this, the jailor,—for his own relief, and finding that the said Bartill thought to take advantage of the said Hendry his absence, and by getting him holden *pro confesso*, for not giving his oath *de calumnia*, should thereby free himself of the said action of reduction, and of proving his exception of minority,—he intents a new summons against the said Bartill, desiring the said action intended by the said Hendry to be transferred in his person *activè*; in respect the first action was intended by the Lords' ordinance, and pursued for his relief and behoof. It was alleged by Bartill, That it was a novelty to transfer but at the instance of heirs, executors, or assignees; and, *ante omnia*, Hendry must give his oath *de calumnia*. The Lords granted transferring, and found no certification could be granted against Hendry that could be prejudicial to Thomas Robertson, at whose instance the transferring was sustained.

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BROUNE of GORGIE MILN *against* THOMSON'S HEIR.

BROUNE of Gorgiemiln married his daughter on Thomson. He deceased before year and day. The tocher-good was 5200 merks;—whereof 1000 merks was paid soon after the marriage: the other £1000 should not have been paid till Whitsunday thereafter. He died in March. On his deathbed, his father-in-law, before the term of payment, comes and really delivers to his good-son the £1000; who, to gratify his wife, instantly gives back the sum, and grants discharge of the hail tocher-good. This father-in-law pursues for repetition of the tocher, in respect his good-son died before year and day after the marriage. It was excepted by the heir of the defunct, that he ought not to restore the £1000, because the payment was simulate; seeing it was instantly taken up again, and a discharge granted by the defunct, *in lecto ægritudinis*, of the hail, which could not burden the heir. It was answered, That he might lawfully dispone his own gear in his own time. The Lords found, That, on deathbed, he might not dispone any of his moveables, but as meikle as fell to the dead's part;