

and made to him for so considerable a sum of money, could not be taken away but *scripto vel juramento* ; and that presumptions could not prove payment, or take away his bond, he being willing to depone and give his oath.

The Lords, notwithstanding, ordained witnesses to be examined, *ex officio*, upon the presumptions and grounds alleged on ; which they found to be as strong as in other cases, where the like was done before.

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1671. June 21. The APPARENT HEIRS of LESLY *against* JAFFRAY.

JAFFRAY having comprised Lesly's estate, and the legal being expired, there was a pursuit raised, at the instance of his three daughters, apparent heirs, for count and reckoning, against the comprisers, *ad deliberandum*, only that they might know if they might safely enter heirs to their father :—It was ALLEGED, That apparent heirs could only pursue exhibition of writs *ad deliberandum* ; but no other action, which might put comprisers, and others having right, to trouble and expenses, of counts and reckonings ; who might sustain great prejudice thereby ; and yet, if they were not satisfied by their intromissions, the apparent heirs were not liable to them. It was REPLIED, That the case of apparent heirs was most favourable ; and, having *annum deliberandi* allowed to them by the law, they might take all lawful ways to know the condition of the estate of the defunct, as was found by two practiques, one *in anno* 1637, betwixt the apparent heirs of Home of Eccles against Home of Blackater ; and another by an interlocutor in a process depending betwixt the Earl of Traquair and the Laird of Kirkhill.

The Lords did sustain the defence, notwithstanding of the reply, and found, That no action was competent to apparent heirs, *ad deliberandum*, but for exhibition of writs ; and having considered the practiques, they found, that the last was upon consent, and did not quadrate ; and for the first, that it was sustained against the factor and trustee of the apparent heir's father, which made the case something different ; but yet declared, that they would not sustain the like in time coming.

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1671. June 24. MR ARTHUR GORDON *against* The LAIRD of DRUM.

MR Arthur Gordon, as assignee constitute by the executor of _____ Gordon, who had obtained decret, against the Laird of Drum, for payment of the sum of 7000 merks, contained in his bond, granted to the defunct, to whom Mr Arthur's cedent and another brother were confirmed executors, and had obtained decret against Drum, as conjunct executors ; but, in respect that the other executor was dead, Mr Arthur, as having right from the surviving executor, pursued for the whole.

It was ALLEGED, That the surviving executor had only right to the half of the sums confirmed ; because, the testament being executed, by the decret ob-