

for the entry, should ly upon the buyer; yet that could not oblige the buyer, unless the seller had infest himself, and delivered a clear progress, and had subscribed procuratories of resignation, or charters for confirmation; none of which was done in this case.

The Lords having considered these points severally, whether the obligation in the minute, That Pourie should infest himself by his own moyen, and the superior's obligation and Bandoch's gift, should free the seller of the hazard of the non-entry, which he might have shunned by that bond: which coming to the question upon Saturday was eight days, the Lords found that not relevant to lay the damage of the non-entry upon Pourie. And then coming to the second point of the fraud, in bringing in Bandoch without acquainting the Master, which, by a former interlocutor, they had found relevant to liberate the seller from the warrandice, as to the non-entry; but thereupon Pourie having craved the master's oath of calumny, he did depone, That, during the dependence of the declarator of the non-entry, Pourie had desired him to agree with Crawford; and that being advised by his lawyers, he would be secure, he had refused to treat, but that Pourie had never spoke to him thereof after the decret of declarator.

The Lords resumed the former interlocutor. And whereas it run in these terms:—That, after an agreement between the superior and Pourie, he could not warrantably acquaint Bandoch to take the bargain, without first acquainting the seller,—The Lords did declare that their meaning was not of an agreement perfected, but of a communing importing an offer by the superior; and they did adhere to the former interlocutor. And having reëxamined the Master, he deponed, That neither during the process of declarator, nor any time thereafter, did ever Pourie, nor any from him, acquaint the Master of any communing with Crawford anent the non-entry; nor did he ever know thereof, till Bandoch had obtained the right.

The Lords found, That that oath of calumny did not prove that Pourie did acquaint the Master of his communing with the superior; and that, having entered in possession of the lands upon a minute of sale, he could not warrantably bring in another to take the gift of non-entry, whereby he was excluded from his possession, unless he had first acquainted the seller with his communing; in which case, if he did either refuse or neglect to follow the communing, and purchase the non-entry, the buyer was blameless and free, though he acquainted a friend to take the non-entry. But, because the Master's oath was only an oath of calumny, the Lords remitted to Pourie's probation, whether or not he acquainted the Master of the communing with Crawford anent the non-entry, *scripto vel juramento*; and ordained Bandoch to depone what he paid to Pourie for the non-entry; and found the Master liable, by the warrandice, to pay Pourie what Bandoch paid to the superior, and no more.

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1681. *February 4.* M'KENZIE of SUDDIE *against* The COUNTESS of SEAFORTH.

MACKENZIE of Suddie, having confirmed himself executor-creditor to the de-

ceased Earl of Seaforth, as being cautioner for him, and distressed, pursues for delivery of his moveables.

The Countess of Seaforth, having confirmed herself executrix-creditrix, also compears, and ALLEGES, She ought to be preferred ; because Suddie, not having paid the sums in which he was engaged cautioner, as he could not have poinded the Earl's goods unless he had paid, so neither can he claim the same goods as executor-creditor : otherwise the debt might be satisfied by the Earl's goods, and yet the Earl not liberated of the debt, but put to an action against his cautioner to purchase him a discharge ; whereas the Countess hath confirmed upon most privileged debts, such as the Earl's funeral expenses, to which she was assigned.

It was ANSWERED, That Suddie, having the first confirmation, which is a decret of the commissaries standing unreduced, there is no place for the Countess her posterior confirmation for the same goods ; but Suddie would have the sole administration, though he had been a mere executor-dative. *2do.* He offers, before he extract, to produce a discharge, from the Earl's creditors, to his successors, of the equivalent sum.

The Lords preferred Suddie to the administration, he producing a discharge before he extract ; but allowed the lady to be heard upon the funeral charges, which is a preferable debt to all others, not as executor, but as a creditor.

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1681. *February 9.* SIR JAMES COCKBURN *against* The LADY CRUMSTAIN.

THE Lady Crumstain having pursued a declarator against Sir James Cockburn, which being disputed in the Outer House, and the Ordinary having ordained some writs alleged upon to be produced before answer ;—which being now produced, the Ordinary having called the cause again,—

It was ALLEGED for Sir James, That writs being produced upon an act, the Ordinary could not determine thereon, but only the Lords *in præsentia*.

It was ANSWERED, That here was no act of litiscontestation, nor an act before answer equivalent thereto, but only a warrant to produce writs which were in the parties' hands, that an allegiance might be founded thereupon, according to the tenor of the writs.

The Lords found, That this being no act of litiscontestation, or equivalent thereto, the Ordinary ought to hear the parties upon the writs produced.

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1681. *February 9.* GEORGE COCKBURN *against* WEEMS.

GEORGE Cockburn having obtained a gift, of the King, of the cocket-office, empowering him to give cockets to all ships loosing in Fife ; there arose a competition betwixt this gift and a prior gift given by the Exchequer, of the same of-