

1683. *December.* M'BRAIRE of NETHERWOOD *against* THOMAS ROME.

IN a declarator of extinction of an apprising, it was alleged, That the same could not be effectual as to accumulations and full penalties, but only for the principal sum, annual-rent, and necessary expenses, in respect the appriser's right to the bond, which was the ground of the apprising, flowed allenary from the creditor's heir, although some annual-rents due before his decease are appraised for, which fell under executry; which ought to cut off accumulations, even as to other sums to which he had right from the heir. Answered, Where any ground of doubt doth appear from the right comprised for, as, if the bond were conditional, or payable at a term after a third person's decease; in that case, if the appriser did not previously declare the condition purified, or if he appraised while the said party was actually living,—there might be some reason to cut off accumulations: but here the bond appraised for being heritable, the appriser had good reason to believe that his right from the heir was sufficient, and was not obliged to inquire when the defunct died; and, though the apprising do not subsist for these annual-rents that fall under the executry, to which the appriser had not a good title, yet, seeing he had a putative title to these, and no dole can be presumed, the apprising *quoad* other sums, to which his title was unquestionable, cannot be restricted to cut off accumulations, or penalties effeiring thereto, seeing *utile per inutile non vitiatur*. This point was not determined, in respect it was alleged, That the appriser had also right from the executor; which the Lords ordained to be produced: but it was found in this cause, that,—albeit where executors pursue, or are pursued, the debtor or executor must have a decret for their warrant, whereof the obtainer will get no expenses,—yet, if the debtor do not pay after the decret, but suffer the creditor to adjudge for his money, then there will be no restriction as to accumulations or penalties, but the whole penalties will be due. *Vide* No. 271, [Lord Harcus and Milnes against Lord Pitsligo, February 1682;] No. 303, [Lord Pitsligo against the Lord Hercarse and Provost Miln, February 1684 and March 1685;] and No. 333, [Colvill against William Hally, January 1688.]

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1683. *December.*

THOME *against* THOME.

A PERSON to whom another, in *liege poustie*, disponed all his goods, and assigned his bonds and tickets, having taken an instrument of possession of the goods, without intimating the assignation, and the goods having remained in the disponent's possession till his death; these, with the bonds and tickets, were confirmed by one as executor-dative to the disponent and cedent, who pursued for delivery of the bonds. Alleged for the assignee, That the pursuer, who is an executor-dative, and not an executor-creditor, is bound to warrant the assignation, though not intimated; and there was no necessity of confirmation. The Lords found, that, though the disponent remained in possession, the executor-dative, who represents him in moveables, could not object against the instrument of possession, so that there was no place for confirming the goods; but the assign-

nation, *quoad nomina debitorum*, not being intimated in the defunct's lifetime, the sums therein were *in bonis defuncti*, and confirmable for the security of the debtor's making payment; but that the executor was liable for them to the assignee. And many were of opinion, that the assignee would be preferred to other creditors doing diligence against the executor, unless they had affected the subject by some preferable diligence. But the creditors were not there competing.

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1683. December. LORIMER *against* LUMISDEAN.

AN act being quarrelled as null: for that, 1. The libel was not proven; 2. A defence of compensation was proponed, which had received no answer;—Answered, The defender not having denied the libel, it was understood as acknowledged; 2. Where the Lords give answer to one defence, it is presumed the rest are repelled. Again, the defender did so far homologate the said Act, that he appeared before the commissioner appointed by the Lords, in pursuance, to examine witnesses, and gave in interrogatories; and the cause is advised now four years ago since the Act, without any reclaiming till of late. The Lords would not reduce or ratify the Act, in respect of the circumstances and state of the cause; but they delayed extracting till February, that the defender might pursue for that debt upon which the compensation was founded.

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1683. December 12. ———— *against* ————.

THE obtainer of a decret of suspension having extracted the bond of caution, and charged the cautioner, who suspended and proponed improbation against the bond, and craved the pursuer to abide by it;—it was alleged for the charger, That the bond of cautionary not being to him, but given in to the clerk of the bills, he could only abide by the extract he had gotten out of the clerk's office. The Lords, having considered that bonds of cautionary are sometimes forged, and that the suspender behoved to be called, they decerned against the cautioner: superseding extract till the latter end of January; that, in the mean time, the cautioner might raise a summons of improbation, and insist therein, which they would summarily take in in this process, and would ordain the clerk of the bills to satisfy the production, by giving in the principal bond.

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About 1683. REID *against* BARNER'S HEIR.

IN a pursuit, at the instance of Jean Reid, against the heir of one Barner her husband, for a jointure provided to her by her said husband, in contemplation