

1685. *February.* LADY BARNCLEUGH *against* CREDITORS.

A RELICT having pursued an adjudication of her husband's lands, upon his obligation, in their contract of marriage, to relieve her jointure-lands of all incumbrances, that she might come in within year and day of his other creditors adjudgers;—it was Alleged for the other creditors, That she could not adjudge for relief, because there was no distress;—and *2d*, The quantity of the distress that could emerge was not liquid. Answered, The grounds of distress were obvious, *viz.* infettments prior to her right; and the grounds of the distress must be supposed as large as the ground of the infettments, and consequently liquid. The Lords, considering that the relict would be absolutely cut off, if she came not within year and day, and there being nothing said against the grounds of the distress condescended on, allowed her to adjudge for the whole, with this express provision, That her adjudication should only take effect in so far as distresses did emerge, and the legal should run from the time of actual distress.—*February 1685, Lady Barncleugh against Creditors.*

And, in November 1685, the Lords sustained an adjudication with the like provision, at a cautioner's instance, who was distressed by a charge of horning, but had made no payment. *Vide* No. 360, [Mary Bruce against Sir Patrick Hepburn, January 1684.]

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1685. *February 12.* HISLESIDE *against* LITTLEGIL, &c.

ONE Mitchel having received, upon his granting a back-bond, an assignation from Littlegil, to a bond of 4000 merks, due by Hamilton of Binnie as principal, and Hisleside as cautioner, and having pursued the cautioner, the defender proponed compensation and payment to the cedent in general; thereafter Littlegil assigned Mitchel's back-bond to Duke Hamilton and his creditors; and, before the term for proving the defence of payment and compensation, Hisleside, the defender, obtained a decret of *male appretiata* against Littlegil; at the advising whereof, it was alleged for the assignees to the back-bond, 1. That the process being now for their behoof, the decret against Littlegil could not meet them; seeing, when their assignation was intimated, the debt of *male appretiata* was not liquid by a sentence, and so cannot be a ground of compensing the debt due to them by the defender. 2. The defence of payment was but made in the general, without any special application to the debt of *male appretiata*. Answered for the defender, Littlegil, or Mitchel his trustee, could not prejudge the defender by any assignation, after the matter was litigious by litiscontestation upon the defence; and the term allowed against Mitchel to prove the defence of payment, consisting *in facto*, must be effectual against the assignees to his back-bond. 2. The exception of payment and compensation, in general terms, was sufficient, the pursuer not having craved the defender to be special as to the ground it was founded on: besides, the defender would lose his debt, if it was not sustained against the assignees, now that Littlegil is insolvent. The Lords sustained the answer, and found

that the compensation meets the assignees, as [it] did Mitchel or Littlegil ; and, there being other grounds of compensation not liquid, the Lords allowed the defender a fortnight to liquidate these, superseding extracting in the meantime. Here the defender's case was favourable, to be free of cautionary paid by the sale of Binnie, the principal debtor's lands ; where Hugh St Clare, who, by virtue of a factory, sold the estate, and paid the debt, took assignation to the bonds, and transferred them to Littlegil.

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1685. *February* 13. JOHN JOLLY *against* The LAIRD of LAMINGTON.

IN a process of forthcoming, at the instance of one Jolly, against the Laird of Lamington, as debtor to Robert Baillie, the pursuer's debtor, compearance being made for Theodore Montgomery, who had right by assignation, intimated before the arrestment ; the pursuer proved, by the assignee's oath, that assignation was a trust for Robert Baillie's behoof ; after which Lamington, having taken a discharge from Theodore, and proponed upon the same, the Lords found, that Lamington was *in mala fide* to disappoint the arrester, by making voluntary payment to the assignee, after he knew the assignation to be trust, and after the matter was litigious betwixt the assignee and arrester ; and therefore decerned in the forthcoming.—*February* 1685.

It was afterwards alleged for Lamington, That the discharge was granted before Theodore gave his oath ; and Lamington protested against his deponing, as being denuded. Answered, The defender was *in mala fide*, after the arrestment, to take a discharge, and ought to have suspended upon multiplepoinding ; 2. The defender's oath of calumny is craved, that the discharge is not of the date it bears, and, being *falsum in data quam præ se fert*, must at best be looked upon but as blank in the date ; so that the defender must prove it was of a date anterior to Theodore's deponing. The Lords sustained both replies ; and found, that the defender could not take a discharge in prejudice of the pursuer, after the matter was litigious.—*February* 1685.

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1685. *February* 13. SIR GEORGE LOCKHART *against* SIR JOHN CLARK of PENNYCOOK.

JAMES Clark, having disponded his lands of Wrightshouses to his brothers, Sir John and William, some years ago, and thereafter, Sir John having taken an heritable bond of annual-rent out of these lands, for the sum contained in the disposition, and other sums then advanced ; they forbore to take infestment till James was broken, and then they infest themselves upon both rights ; and, the day after, Sir George Lockhart was infest in an annual-rent upon James Clark's bond. There arose a competition betwixt Sir George and the two brothers of the common debtor. Alleged for Sir George Lockhart, That he ought to be preferred, in respect the brothers' delay to infest themselves, to cover James's trade