the diligences he had done for recovery of those debts contained in the factory, and that his acceptance of the instructions should be but prejudice to him to make the charger liable for such of those debts contained in the factory as might have been recovered by diligences. But the answer to this was, that the very title calls them bad and desperate debts; and that this being debated, the Lords took no notice thereof. They also granted a commission to Rowen, to examine witnesses, if Mr Scoular was sole cash-keeper: against which it was objected, that though it fell under the senses, and so was probable by witnesses, that he was cash-keeper; yet it did not that he was sole cash-keeper, because Mr Arnault might also have been cash-keeper. But it were absurd to suppose two.

Mr Hamilton grudged, that Arnault, Scoular's partner, had hooked them into a bargain at Rowen, to give £34,000 as his neat part and result of the effects, upon his assigning them to the whole count-books and annualrents of it; whereas many who are inserted in the count, denied the debts when they came to pursue them, and the Lords assoilyied them from the article of annualrents: so he was lesed by the transaction *ultra dimidium:* and if they would repone him, he offered Arnault the half of all. On the other hand, Arnault urged, that *transactio* was *finis litis;* and if the Lords would find the letters orderly proceeded, he would find caution to count for all thir grounds of compensation.

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1686. *March* 30. JAMES GRAHAME *against* JAQUES MELL.

BAILIE James Grahame, in Edinburgh, against Jaques Mell in Rowen, who had fled thence for the persecution; and, upon letters from James Grahame, inviting him here, and promising him all security and assurance, had come to Scotland; and yet getting him engaged in a submission, and a decreet-arbitral, he was offering to distress his person thereon, though he had goods of his in his hands near to the value of 8000 livres, and the whole claim was but 10,000 livres.

The Lords ordained him to apply by suspension: and Bailie Grahame, by a bill to the Privy Council, pretending that he was about to flee, got a warrant to arrest him. They afterwards made some agreement. *Vol. I. Page* 412.

1685 *and* 1686. AGNES NISBET *against* ISOBEL and ESTHER SMITH and their HUSBANDS.

1685. *February* 21.—AGNES Nisbet against Isobel and Esther Smiths, and Mr Alexander Bruntfield, and Scot, their husbands, is reported by Carse; and the Lords sustain process at the said Agnes the pursuer's instance. And also find, that the defenders having been silent for several years since the expiration of their respective pupillarities, so that they never did intent action for clearing their tutor-accounts, against Mr Alexander Heriot, their uncle, and late husband to the pursuer, till this process was raised against them by her; that therefore the pursuer must have payment of the debts now pursued for, without abiding the event of a count and reckoning anent her husband's in-

tromissions, as the defender's tutor; the pursuer always finding caution to the defenders to refund what she shall be found liable in upon her husband's account foresaid, in the event of a process of count and reckoning.

The case here was, that the assignations to their father's bonds were taken by him blank, as is alleged, in the assignee's name, before he was tutor, and filled up since, and so could not be paid *ex bonis pupilli;* though the other reason and presumption of law may here take place, *viz.* that he was paid by his intromissions, *et intus habebat.*

The decisions, *24th January* 1662, *Sir J. Ramsay* against *The Earl of Winton,* and that of *Grierson of Lag* against *Carruthers of Holmains,* tie them only to find caution; which the Lords have followed in this, and not that late decision, *2d December* 1679, *James Cleland* against *Bailie,* where an assignee's process was stopped till the tutor-counts were made. But that being a single practick, they resolved, after much reasoning, *(renitente Præside,)* that the two should preponder the one. And this decision was different from *Cleland's* in this, that the right of the debts was in his person prior to the office. Yet, on the *18th November* 1679, *Thomas Lennox,* because trustee and factor for *Broughton,* was stopped from personal execution on clear debts, till he made count and reckoning to him.

But, upon a second debate, this cause being again reported by Carse, the 13th March 1685, the Lords rectified their interlocutor thus far, and sustained the defence, that the pursuer's husband acted as the defender's protutor before his acquiring the assignations to the debts now pursued for, and continued to act till the year 1682, and did not make an account; being proponed *peremptoriè in causa, et cum onere maximarum expensarum:* and found the continuing to act (which takes off the taciturnity,) is proven by the writs produced; but that the defenders must also prove, that the defunct Mr Heriot, their uncle, had acted as protutor before the acquiring of the assignations to the debts now pursued for; and ordain the defenders to pay to the pursuer a year's annualrent of the sums pursued for, betwixt and Whitsunday next, the pursuer finding caution to refund the same, if, by the event of the count and reckoning, it shall not be found due. *Vide* 26th Nov. 1685. *Vol. I. Page* 342.

1685. *November* 26.—Agnes Nisbet against Smiths and their husbands, mentioned 21st February 1685. The Lords, upon Redford's report, refused to delay Nisbet the pursuer till the event of the Smiths' reduction, but decerned them to fulfil the disposition; and declared their obedience to this sentence shall not prejudge the defenders, in case they prevail in the reduction of the disposition *ex capite lecti.*

The Lords refused here what they are commonly in use to grant, *viz.* to decern, superseding extract for such a reasonable time as the reasons of reduction may be got discussed.

Then the principal cause being reported by Carse, on the 4th of December, the Lords, before answer, ordained both parties, *hinc inde,* to prove the points condescended on for inferring protutory or liberating therefrom, *viz.* whether Mr Alexander Herriot was the doer of their affairs, or was only present as their uncle, and an adviser; and who was the intromitter; and found the same probable *prout de jure.* *Vide* 30th March 1686. *Vol. I. Page* 377.

1686. *March* 30.—Agnes Nisbet craving by a bill to have her cause against Mr Alexander Bruntfield, &c., mentioned 26th November 1685, summarily advised, and the annualrent of her bonds to be paid her in the mean time during

the dependance; the Lords refused both, being now in the end of the Session. *Vide* 8th December 1686. *Vol. I. Page* 412.

See the posterior parts of the report of this case, Dictionary, page 12,081.

1686. *March* 30. FRANCIS KINLOCH *against* HAY of MONKTON and his BROTHER.

FRANCIS Kinloch gives in a petition against Hay of Monkton and his brother, craving the certification extracted by them *contra non producta* may be recalled, seeing he had offered to prove, by Monkton's oath, that he had papers in his hands, which *in græmio* excepted Francis Kinloch's lands, and he did not produce the papers themselves, but only deponed that his disposition excepted the back-tenement, but not the fore one.

The Lords would not recal the certification. *Vol. I. Page* 412.

1686. *November* 4. DOCTOR DONALDSON *against* SCOULAR'S HEIRS.

DOCTOR Donaldson pursuing the heirs of Scoular, factor in Rowen; the Lords found them liable to pay a bill of £154 sterling, on a missive letter wrote by them. *Vol. I. Page* 426.

1685 *and* 1686. JOHN JOHNSTON and EDWARD WRIGHT *against* BRUCE of NEWTON and BRUCE of KINNAIRD.

1685. *November* 19.—AT Privy Council, Bailie John Johnston of Polton, and Mr Edward Wright, advocate, pursue Bruces of Newton and Kinnaird for a riot, in taking away the teinds of these lands; though they stood infeft in them, and had a decreet of removing. ANSWERED,—An inhibition is the only habile way to infer a spuilyie of teinds, and not a decreet of removing.

REPLIED,—This is not a teind between an heritor and a churchman, (where inhibition is used,) but a third and teind between master and tenant.

The Lords demurred on this point. *Vide* 11th November 1686. *Vol. I. Page* 376.

1686. *November* 11.—John Johnston of Polton, and Mr Edward Wright, advocate, his son-in-law, against Bruce of Newton, mentioned 19th November 1685. They, standing infeft in his lands as creditors for great sums of money, pursue a removing: the other posterior creditors join with Newton, and OBJECTED, they had no right to remove him from the teinds, they not being apprised. ANSWERED,—He had comprised *omne jus*, which would carry the teind. *2do*, They were contained in a voluntary right they had.

Then they alleged payment; which was found relevant: but, in regard the the same was very improbable, they ordained the defenders to find caution for the violent profits *medio tempore*, seeing they stopped the removing. *Vol. I. Page* 426.