

1688. *June 23.* MAJOR MURRAY *against* BAILLIE of TORWOODHEAD.

MAJOR Murray having pursued Baillie of Torwoodhead, as heir of line to the late Lord Bramfoord,—he alleged, That the Lady Forrester, the Lord Bramfoord's heir of line, who had right to his estate, ought to be first discussed. Answered for the pursuer, That it is declared, by a decret of Parliament, that my Lord Bramfoord's estate, for preservation of the family, should fall and belong to Edward Ruthven, his grandchild, passing by his mother, the heir of line; which decret of Parliament cannot be called in question by any inferior judge: and though it be quarrellable, as unjust, before the Parliament, yet creditors are only obliged to discuss the heir of line's unquestionable estate. Replied for the defender, That decreets of Parliament ought only to stand as to persons cited, and not as to such as were never called thereto. Now, the creditor, pursuer, was not cited, but only the Countess Dowager of Bramfoord, and that upon a bill, too, without a process. Duplied, The Act of Parliament, declaring, that sentences of Parliament are not to be quarrelled by inferior judges, doth not distinguish whether parties be cited or not, or if there be or be no compearance; and decrees of Parliament fall not under the act *salvo jure*. The Lords sustained the duply, and decerned against the heir of tailyie.

*Page 13, No. 72.*

1688. *June 29.* GARDINER *against* The LAIRD of LAG.

[See the prior part of this report, Dict. p. 1082.]

THEREAFTER it was alleged, That diligence by horning and caption, prior to the inhibition, was done on three of the bonds acquired; and any creditor, using prior diligence, may take his payment. Which the Lords sustained as relevant.

*Page 34, part of No. 154.*

1688. *July.* The LAIRD of ARNISTON *against* WILLIAM BORTHWICK.

ARNISTON having, after citation in a summons of mails and duties, at his instance, upon two infestments, infest himself upon another bond, compearance was made for William Borthwick, who craved to be preferred to the pursuer's first infestment, upon this ground, that they were base till a decret of mails and duties; and there was a signature for confirmation of Borthwick's infestment presented in exchequer before Arniston's process, although the confirmation was long posterior. Answered, The presenting of signatures is not considered, but the infestment thereon. The Lords preferred Arniston for the first infestments.

Thereafter the pursuer claimed preference likewise for the other infestment. Answered, That the posterior infestment could not be clothed by the prior citation. Replied, Borthwick's infestment being no otherwise clothed than by his producing the same, and competing thereon in the pursuer's process,

that same process must also clothe the pursuer's second infestment, which is produced and debated on ; at least, it must come in *pari passu* with Borthwick's. Duplied, In a competition of base infestments, the first is always preferable ; and the pursuer's second infestment is posterior to Borthwick's. 2. Though a third party's competing is sustained as a publication of his right, 'tis not so where a pursuer competes in his own process. Triply, A pursuer producing a base right, and competing thereon with a third party, must be as effectual to clothe it with possession, as that third party's right would be clothed by his so doing. The Lords preferred Borthwick upon the first duply. And it was not known but that both infestments were otherwise unclothed.

*Page 170, No. 611.*

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1688. *July.* ROBERT CAMPBELL, Dean of Guild in Glasgow, *against* GEORGE CLERK.

It being objected against the intimation of an assignation at the market-cross, to a party out of the country, that it did not design the debtor ; it was answered, That the Act of Parliament, appointing the designation of debtors, concerns citations in processes. Which was sustained. *Vide* No. 82, [Rigg against Sir William Primrose, March 1684.]

*Page 24, No. 125.*

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1688. *July 6.* CAPTAIN DALZIEL and His SPOUSE *against* SCOTSTARBET, &c.

MR John Ellis, younger, advocate, having made a bond of tailyie of his personal estate to heirs-male ; which failing, to the daughters, with an express provision, That it should not be in the power of any of the heirs of tailyie to uplift the sums, without consent of some persons nominated, except that the daughters may make over their shares in their contract of marriage, with consent of other persons than the former :—Captain Dalziel, who married one of the daughters without the friends' consent, pursued a declarator for obliging these friends to consent, or getting the money, by the Lords' authority, without their consent. Answered for the friends, The succession to the sums, by the pursuer's contract, is not according to the father's destination, but goes to the Captain and heirs, failing children of his wife's body. 2. By a general provision, after all, the sums are not upliftable without consent of the subsequent immediate heirs of tailyie. 3. The father having given the friends a power to consent to the daughters' marriage, and consequently to dissent, that must have the effect of an irritancy, in case of marriage without their consent ; and, if their consent had been antecedently required, they had reason to refuse it, seeing the Captain was not able to make a suitable provision on his part, and the terms of the father's destination were altered. Replied, The provision hath no irritancy, or obligation *quoad* the marriage ; and many persons make as unequal matches. 2. The general exceptions being posterior to that, except in their contract of marriage, &c. does not derogate to the special ; for it is not probable the father would have