

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.

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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.]

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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

made his daughters' portions depend on the subsequent heir's consent. 3. The particular exception must derogate from the destination as well as other things; it not being usual that matches could be had, where tochers are under so strict destinations; besides, the daughter was in fee, and might dispose for such an onerous cause as marriage. The Lords found, that the contract ought not to alter the father's destination, failing bairns of his daughter's body; and the defenders craved the pursuers might find caution in that event.

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1688. *July 14.* MRS EFFIE SCOT *against* DANIEL NICOLSON.

Mrs Effie Scot having transacted a debt contained in her father's bond, on which she was pursued as representing him, and thereafter discovered that the said bond was found among her father's papers after his death, blank in the creditor's name, she raised a declarator of extinction of the bond and transaction; seeing, by the civil law, transactions may be rescinded *super instrumentis falsis*. Answered, Though the bond had been taken out among the defunct's papers, that could not prejudice the defender, a creditor who had it for an onerous cause, and was not *doli particeps*; and transactions are the greatest security of the lieges. The Lords demurred to rescind the transaction; but, before answer, allowed probation as to the point of fact of taking out the blank bond, in order to relief against the uncle Mr James Scot, who was alleged to have taken out the same.

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1688. *July 18.* LORD PANMURE *against* The VASSALS of ABERBROTHOCK.

IN a poiding of the ground for feu-duties, at the instance of the Earl of Panmure, as lord of erection, against the Vassals of Aberbrothock;—Alleged for the defenders, That this manner of execution is only competent to superiors; and, by the Act 10, Parl. 33, the superiorities of church-lands are annexed to the crown, and the feu-duties only are reserved to the lords of erection, till redeemed by the king; and the execution by horning and poiding, appointed in that Act, is not real execution *contra fundum*. Answered, As the feu-duties remain with the lords of erection as formerly, so the same execution is competent for these as before. 2. An assignee to feu-duties may poid the ground in his cedent's name; *multo magis* may the lords of erection, who are assignees by reservation, poid for theirs.

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1688. *July 20.* The LADY HARDEN *against* CRAIGENTINNY.

SIR John Nisbet having, *in anno* 1686, disponed, to young Craigentenny, all