

The Lords observed, that both apprisings and adjudications were here called for, and yet there was a great difference betwixt them : for the grounds and warrants of adjudications, as to the judicial procedure, (abstracting from the titles of the pursuit,) were not taken up, but left in the clerk's hands, and might be sought for there. But, as to apprisings, the letters and executions were given back to the party, yet so as they were *verbatim* engrossed in the decret of apprising, and so their nullities might be fished out there. But, that the Lords might be uniform, they ordered that practick of Polguild and Kilry to be produced, that they might see what course the Lords steered there.

In the same process, the Lady craving certification against a disposition made to the Duke, by Major Grant, of these lands, and by the Laird of Buchanan to the said Major ; ALLEGED,—You can never quarrel that disposition ; because your own bond for £1000 sterling from Major Grant, narrates, that he had granted a disposition to the Duke for the burden of her debt, and which bond she having accepted, made use of, and now founding on it, you can never quarrel what it homologates *per expressum* ; and so Spottiswood, *voce* Improbation, observes, in *Keith of Benholm's case*, 24th March 1635. And, to seek to improve and reduce this disposition, is so inconsistent that it destroys your own right, flowing from your immediate author, Major Grant, and narrated in your own bond ; for this was both to approbate and reprobate the same writ.

ANSWERED,—I may quarrel any deed, whether granted by myself or to myself, if it be my interest to remove it out of the way ; which is the present case.

Some of the Lords thought the regular action for getting thir writs was an exhibition, rather than a reduction and improbation. Others said, This allegiance could not hinder the taking a day to produce whatever might operate in discussing the reasons of reduction ; but the point was not determined at this time.

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1708. *July 27.* LORD ELIBANK *against* ALEXANDER MACKENZIE OF FRASERDALE.

LORD Elibank, as heir to his mother, eldest daughter to Doctor Burnet, late Archbishop of St Andrew's, pursues Alexander Mackenzie of Fraserdale, son to Lord Prestonhall, in a count and reckoning, for half of the bishop's executry intromitted with by Prestonhall.

ALLEGED,—By the bishop's testament and codicil, Anne Burnet, Lady Prestonhall, his second daughter, is nominated executrix and universal legatrix, and so has the total right and property of the goods established in her person ; and the Lady Elibank, her sister, had only the half of what she could recover ; and he is content to account for the half of all he intromitted with, seeing it is not to be presumed he would let it perish, the half of it being his own ; but he cannot be obliged to count exactly and precisely for diligence like other executors, because the bishop, by his testament, has allowed the legatars to affect the goods dispoed, in case his executor be negligent or delay their payment ; which imports, that he did not tie his executor to diligence.

ANSWERED for Lord Elibank,—That all he craved from Lord Prestonhall was to count to him for the inventory of the testament confirmed ; and, where he

shows either diligence, or that it would have been frustraneous, he is willing to allow it, though not recovered : for, if the debtors were insolvent, that was to cast out money in vain to pursue them. But to exeme him from diligence totally, that he might count only what he had actually received, is contrary to the very nature of the office of executry, and destructive to the interests of orphans, relicts, creditors, legatars, and all others concerned ; and saps and subverts the very foundations of law : For *quorsum* is an inventory given up, and faith made upon it, and caution found, if the executor will count for no more than what he has received ? For how should we know what he has got and what he has not ? Therefore, the only rule must be, what diligence has he done for recovering the inventory : and law has no remedy to relieve him of that, but in one single case, viz. where, by mistake, he has given up and confirmed heritable sums, as if they had been moveable ; but the hazard lies most on the other hand, of giving up a short defective inventory. And this being a frequent case, occurring every day, law has provided two remedies for obviating thereof, viz. a dative *ad omissa* and *ad male appretiata* ; but there is no dispensation with the doing of diligence. Yea, some think the testator himself could not discharge it, being contrary to *jus publicum* and the general utility ; and the clause adjected by the bishop, giving the legatees access to affect executry-goods as fully as if they had a special assignation thereto, in case of the executor's negligence, makes no specialty to import a liberation from diligence ; for that is no more than what is implied in the nature of all executors, that those having interest in the confirmed goods may affect them *quoad non executata*.

The Lords found Prestonhall and his son accountable for the inventory given up in the testament, whether recovered or not ; but with this quality, That, in discussing the particular articles, he might discharge himself with proving he had done diligence, or that the parties were insolvent and the debts irrecoverable. This was so decided, *me referente*. *Vol. II. Page 457.*

1708. July 29. LADY TOLQUHON *against* FORBES of TOLQUHON, her Son.

LADY Henrietta Erskine, daughter to the Earl of Buchan, and relict of Forbes of Tolquhon, pursues her son, the Laird of Tolquhon, for an aliment out of his estate, till she have a right to her jointure, there being no contract of marriage.

ALLEGED,—That, she being married again to Mr Abercrombie, brother to my Lord Glassford, he is bound in law to entertain and keep her ; and can claim no aliment from her son *super jure naturæ* ; which action is only competent when they have no other mean of subsistence : and it is better she depend for that on her present husband than to straiten her son, whose estate is reduced to a very small pittance by his uncle Sir Alexander Forbes' mismanagement and infrugality. *2do*, Though she has no contract nor jointure *provisione hominis*, yet she may claim a terce of what her husband died last vest and seised in, *provisione legis*. Likeas, she acquired the gift of her son's ward and marriage, by which she might state herself creditor. *3tio*, She had sundry intromissions.

ANSWERED,—Her present husband has been forced to pay some debts she had

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