for him who denied the libel, yet the same was altogther ultroneous, he having given no mandate or order to the Procurator for that effect. *2dly*, In this case there was no injury committed; nothing but a few idle words having dropt from him, *ex calore iracundiæ*, without any *animus injuriandi*, which, in verbal injuries, ought to be plainly proved. *3dly*, Six days after committing the offence, the private parties injured disclaimed all process of scandal, either at their own or at the Fiscal's instance, against the suspender; as appears from the disclamation now produced. *4thly*, The Fiscal could not, after the private parties had remitted the injury, *per se*, insist *ad vindictam publicam;* seeing, from the nature of his office, he had no power to prosecute private delicts, being only a Procurator appointed originally by the Bishop to take care of confirmations and quots of testaments.

To the *first* reason of suspension, it was ANSWERED,—That a regular execution was produced before the inferior court against William Chatto; after which, a Procurator appeared for him, who denied the libel; in consequence whereof, several diets were appointed for examining the witnesses: so that neither Judge nor Fiscal hastened matters, in order to take any undue advantage. *2dly*, The expressions libelled were very injurious; consequently, it was no ways material whether they were spoken in a passion or not. And as to the design of injuring, that can only appear from the expressions. Neither is there any necessity of proving the *animus injuriandi*, where the words used can bear no other meaning. With respect to the *third*, the private parties injured appeared in Court personally several times, supplicating for justice; so that, although the disclamation bears date before the commencement of the process, yet that can afford no reason of suspension, as it was not produced nor pled upon before the inferior Judge. *4thly*, Granting the disclamation were to have its full force, or that the private parties had appeared personally before the Commissary, and judicially disclaimed the process; still that could not have barred the Fiscal from insisting; seeing, as *vindictor publicus*, he has an interest to prosecute crimes without the concurrence of the private party. And, as the Commissaries are vested with a power of punishing scandalous expressions, there is no reason why the Fiscal should not have such fines, as a perquisite of his office; though, in the present question, the sum charged for is only applicable to the use of the poor.

The Lords suspended the letters *simpliciter*. *No.* 52. *page* 87.

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1737. *July* 22. Competition, JAMES GRANT, &c. *with* ROBERT SUTHERLAND.

WILLIAM SHAW, drover, having died in England, his son Robert intromitted with his effects; and in the year 1728, he gave in a petition to the Commissary of Inverness, acknowledging, That, after all deductions, there was L240 Sterling of his father's money still in his hands: on which the Commissary decerned him executor to his father. After this, he died before any confirmation was expede. Whereupon the said James Grant, &c. being creditors of William Shaw, applied to have Robert's repositories searched; that so the money, which he owned belonged to his father, might be secured for their behoof; but upon a search being made, there was only found L126, so that there was wanting L114.

As this was the fact, James Grant, &c. imagining that Robert's intromission with his father's effects made him liable to them to the extent thereof, applied to the Commissaries to be decerned executors *qua* creditors to him; who accordingingly decerned them executors, with license to pursue.

Upon this, Grant brought a process against John Mackay, who was debtor to Robert Shaw in L114, which was the precise sum wanting of the cash that Robert had acknowledged to be in his custody belonging to his father.

Robert Sutherland being also creditor both to William and Robert Shaws, was, upon a decreet he had obtained against Robert, confirmed, anno 1734, by the same commissary, executor-creditor to him, in the sum due by Mackay to Robert; and upon this title, he compeared in the above process, and craved to be preferred.

The grounds upon which Grant, &c. founded their preference were, their being decerned executors-creditors to Robert, as early as the 1728, with a license to pursue: and, upon that title, having brought this action, they ought to be preferred to Sutherland, whose confirmation is dated only in the year 1734; which could not regularly have been granted to their prejudice, who were decerned executors so long before, without being called to that second confirmation.

ANSWERED for Sutherland,—When he confirmed the subject in dispute, all the creditors of Robert were then called edictally, as the law requires; consequently, so were his competitors, if they are creditors of Robert; which, it was contended, they were not. *2do*, Granting they were creditors to Robert, he knows no law to hinder him to confirm any subject of his debtor's not yet confirmed; as he takes it for a principle, that, after the lapse of six months from the debtor's death, it is confirmation only, and not a license to pursue, that gives the preference. *3tio*, His competitors have no proper right in their person, whereon they could be decerned executors-creditors to Robert; because they were not creditors to him, but to William his father; of course, they could no more confirm themselves executors-creditors to Robert, than they could have confirmed themselves executors to any debtor of the father's, without previously constituting the debt against such debtor's representatives: therefore, he should be preferred, as being the only proper creditor of Robert who has made up a complete title to the sum in question.

REPLIED,—Though it may be true, that, if a person decerned executor with a license, does not prosecute his right, the commissary may confirm another; yet this cannot be done, until the person first decerned be called; because a right is not to be taken away, *parte inaudita*. And as to the allegeance, that the pursuers have no proper right in their person, whereon they could be decerned executors to Robert; it was answered, that they are not bound to enter into the dispute, whether the commissary did right or wrong in giving them that title; as it surely excluded any after-confirmation till it should be altered by the judge. *2do*, It is alleged without ground, the pursuers are not creditors to Robert; for although it be true, that they were not originally creditors to him, yet they became so, by his intromission with his father's effects, whereby he represented him *in valorem*. See 26th *December*, 1705, *Dickie*. And as to the supposition, the pursuers could no more confirm to Robert, than they could to a debtor of the father; it has no affinity with the present question; seeing the difference lies here, that a debtor

to the father is not debtor to his creditors: but, in the present case, Robert, by his intromitting with his father's effects, and disposing upon part thereof, thereby represented him; and so *in tantum*, became debtor to his creditors.

The Lords preferred Robert Sutherland.

*No.* 70. *page* 116.

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1738. *January* 6. ALEXANDER WATSON of Glentarky, *against* PATRICK DAVIDSON.

WATSON of Glentarky settled his estate upon Margaret Watson his only daughter, whom failing to the said Alexander Watson, second son to Watson of Aithernie; he likewise nominated Aithernie, and Jean Watson his spouse, &c. to be tutors to his daughter. After his decease, the tutors took upon them the administration of the pupil's affairs; during which, the said Jean Watson intromitted with several moveable subjects belonging to her daughter, extending to above 4000 merks; and afterwards she married Provost Davidson in Perth, in whose house the pupil stayed for about nine years, and then died: whereupon Provost Davidson applied to Aithernie for payment of Margaret Watson's aliment, while she lived with him; and he, as tutor to his son, who succeeded to the estate of Glentarky, in virtue of the above settlement, granted a bond of 4000 merks for the aliment. Which bond the said Alexander Watson corroborated in his minority; but, so soon as he came to be major, he intented a reduction thereof, upon the head of minority and lesion, insisting chiefly on this ground: That no bond ought to have been given to Provost Davidson; seeing his claim for the aliment might have been set aside by compensation, in so far as his lady was debtor to the minor in a sum exceeding the value of the aliment, and that he was liable for her intromissions.

ANSWERED for the defender,—The bond was granted for a most just and onerous debt, and to which the pursuer, as heir to Margaret Watson his predecessor, would have been liable; consequently, he was not lesed by granting a security for the same. And, with respect to the reason of reduction insisted on, it was observed, that there was no ground of compensation competent either to the pursuer, as heir to Margaret Watson, or to her executor, on account of the provost's lady's intromission; seeing the same was not liquid, and afforded only a ground for intenting an action of count and reckoning against the provost's lady; which could not affect or make him debtor therein, until the debt was constituted against him. Neither has any action been hitherto brought for that purpose; of course, the omission to propone this *No* compensation, is no lesion at all.

REPLIED,—The lesion here is obvious; seeing the pursuer had a clear and relevant objection against granting these bonds, in so far as the aliment might and ought to have been satisfied by the sums due by the tutrix and her husband, as liable for her debts. And, in all such questions as the present, the only thing inquired into, is, if the minor be lesed; not what was the condition of the other party: yea, even where the agreement is never so fair on the other side, if the minor