

tion, to prefer the pursuer to any other creditor, to the effect that the pursuer might obtain sentence of adjudication first; neither was it lawful to the pursuer to accept a renunciation from the defender by collusion; because he offered him to prove that the pursuer omitted a competent reply, which the said Alexander alleged by way of exception, *viz.* That the defender cannot be heard to renounce:—*1mo.* Because he has curators, and they have not subscribed the renunciation produced: *2do.* He has behaved himself as heir to his grandfather by intromission with his heirship-goods: *3tio.* The gift of the ward of the half lands of Kincaig, holding of the Laird of Lundie, is granted to the defender himself, or the donator for his behoof. Answered, This creditor could not stay the accepting of this renunciation, because the pursuer will accept it with his hazard, and let Alexander go on in his cause as he pleases. The Lords repelled all these allegiances proponed by Alexander, and would not stop the pursuer's action, who had used greatest diligence.

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1629. *January 22.* HENRY FAIRBAIRN *against* BARTILMO KELLO.

HENRY Fairbairn being addebted in 1000 merks to Bartilmo Kello, by virtue of letters of caption, was apprehended and incarcerated, by Bartilmo, in the tolbooth of the Canongate; out of which he having escaped, Bartilmo obtained a decret against the bailies and jailer for suffering him to escape. They, to free themselves of the debt, intent an action of reduction and restitution, *in integrum*, in name of the said Henry Fairbairn, against Bartilmo, *ex capite minoritatis*. In which action there was an exception proponed by Bartilmo, that he offered him to prove that the said Henry was major the time of the subscribing of the bond. For proving of the which exception there was a day assigned to the expicent. Before the day, the defender raiseth a summons against the said Henry, to give his oath *de calumnia*, that he had just cause to pursue the libel. The day taken by the defender to prove his exception being come, and he having produced nothing for proving thereof, the pursuer extracts an act, and craves the term to be circumduced. Answered, He ought not to produce any diligence before the pursuer gives his oath *de calumnia*. Replied, That the action being pursued to the behoof of the bailies and jailer, and for their relief, although they used Henry's name, his contumacy could not prejudice them; yea, albeit he were present and would depone, yet he could not do it in their prejudice, he being bankrupt, and bearing ill will at them for detaining him in ward. The Lords would not hold Henry as confessed, to work any thing in prejudice of the bailies and jailer. Further, the said bailies and jailer craved that the said action of restitution, *in integrum*, might be transferred in their persons. Answered, The action could not be transferred, seeing there can be no transferring but in the person of an heir or successor, &c. The Lords sustained the transferring.

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