

would have no respect,—this right being only a right of comprising: [and] would not allow the pursuer to produce his author's right.

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1666. July 10. ANDREW YOUNG *against* JOHN FAIRFOULL and SOMERVAILL.

JOHN Fairfoull as principal, and Somervail as cautioner, by their bond, dated 2d December 1619, are obliged to pay to Walter Turnbull, chirurgeon, for himself, and in name and behalf of the trade, a certain sum; which bond being assigned by the deacon of the trade, with consent of the masters thereof, to Arthur Temple, he did thereafter transfer the bond to Andrew Young, writer. The debtor, being charged, suspends upon a reason of double poinding; *viz.* by this charger on the one part, and James Campbell, writer, on the other part.

It was ALLEGED for James Campbell, That he being donatar to the gift of bastardy of John Bisset, chirurgeon in Edinburgh; and having obtained general declarator of the said gift, and a decret of special declarator against the said John Fairfoull, decerning him to make payment, to the said James Campbell, of the whole goods confirmed by him in Bisset's testament, and meddled with by him: and that he ought to be preferred in the right of the said sum, because he offered him to prove, by Young's oath, that the charge was to the behoof of Arthur Temple, his cedent; at least he offered him to prove that he intented action, and arrested the same; and thereby made the same litigious before the said transaction: which being proven, he offered him to prove, by Arthur Temple his oath, that the true cause of the granting the said bond was a legacy left by the said umquhile John Bisset, bastard, to the said incorporation; whereupon the said John Fairfoull gave bond: which being also proven, the said James Campbell, as donatar, must be preferred in the said sum; because the said Bisset, having died bastard and illegitimate, he had no *testamenti factionem*; and so could leave no legacy in prejudice of the king and his donatar. And the said bond being truly given for the said legacy, the sum therein contained must be decerned to be the donatar's.

Whereunto it was ANSWERED by Andrew Young, That Arthur Temple being denuded in his favours, he could not swear: that the allegiance proponed for the donatar was only probable by Young his oath.

The Lords found that it was only probable, by the assignee's oath, and not by the cedent, that the transaction was to Arthur Temple's behoof.

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1666. July 13. WILLIAM OLIPHANT *against* JAMES CLERK of PITTENCREIF.

IN a suspension raised at William Oliphant's instance, against James Clerk of Pittencreif, of a minute of contract, whereby the said Oliphant was obliged to cause John Oliphant of Carpon, with consent of the curators, dispone to the

said James Clerk some acres about Dumfermline, and to infest him therein, betwixt and a certain day ; and that under a penalty of 500 merks :—

It being questioned whether or not this obligation was to be fulfilled *in terminis*, viz. by the said William Oliphant his causing John Oliphant serve himself heir to his father ; and being infest as heir to him, to dispoise to the said James Clerk ; or if it might be fulfilled *per equipollens*, viz. by the said John Oliphant his assigning the right of the said action, which stood in his father's person, by a simple disposition, without any infestment ; whereby the said James Clerk might obtain an adjudication of the said right of the acres :—

The Lords found that the minute might be fulfilled *per equipollens* ; and assigned a new day for that effect ; reserving to themselves the consideration of the failie.

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1666. July 14. MARGARET BRYSON *against* ANDREW BRYSON her Brother.

MARGARET Bryson, daughter to Andrew Bryson, pursues Mr Andrew Bryson her brother, (her tutory being expired,) for count and reckoning, and for exhibition. The exhibition being insisted on, and a day taken to produce him, he refused to depone upon the general clause, and also to depone anent his knowledge of some other writs, and of some clauses contained therein ; which was referred to his oath.

The Lords, in respect the defender refused to depone, or that he knew of the writs libelled, held him as confessed.

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1666. July 14. PATRICK LEITH of WHYTHAUGS *against* ALEXANDER GAIRDEN of TROUP, and OTHERS.

In a reduction, pursued at Patrick Leith's instance of Whythaugs, against Alexander Gairden of Troup, and others ; the probation being closed and renounced, and the clause being ready to be advised :—

The parties being called, It was *CONTENDED*, that the Lords could not proceed to the advising of the cause, because John Lyon of Muiresk, one of the parties called in the process, was dead, and therefore the advising behoved to sist till the process were transferred against the apparent heir.

Which the Lords found behoved so to be.

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1666. July 17. GORDON of BIRSMORE *against* JOHN JOHNSTOUN of FROSTERHILL.

JOHN Johnstoun of Frosterhill having dispoised his lands of Frosterhill to Gor-