

and made to him for so considerable a sum of money, could not be taken away but *scripto vel juramento* ; and that presumptions could not prove payment, or take away his bond, he being willing to depone and give his oath.

The Lords, notwithstanding, ordained witnesses to be examined, *ex officio*, upon the presumptions and grounds alleged on ; which they found to be as strong as in other cases, where the like was done before.

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1671. June 21. The APPARENT HEIRS of LESLY *against* JAFFRAY.

JAFFRAY having comprised Lesly's estate, and the legal being expired, there was a pursuit raised, at the instance of his three daughters, apparent heirs, for count and reckoning, against the comprisers, *ad deliberandum*, only that they might know if they might safely enter heirs to their father :—It was ALLEGED, That apparent heirs could only pursue exhibition of writs *ad deliberandum* ; but no other action, which might put comprisers, and others having right, to trouble and expenses, of counts and reckonings ; who might sustain great prejudice thereby ; and yet, if they were not satisfied by their intromissions, the apparent heirs were not liable to them. It was REPLIED, That the case of apparent heirs was most favourable ; and, having *annum deliberandi* allowed to them by the law, they might take all lawful ways to know the condition of the estate of the defunct, as was found by two practiques, one *in anno* 1637, betwixt the apparent heirs of Home of Eccles against Home of Blackater ; and another by an interlocutor in a process depending betwixt the Earl of Traquair and the Laird of Kirkhill.

The Lords did sustain the defence, notwithstanding of the reply, and found, That no action was competent to apparent heirs, *ad deliberandum*, but for exhibition of writs ; and having considered the practiques, they found, that the last was upon consent, and did not quadrate ; and for the first, that it was sustained against the factor and trustee of the apparent heir's father, which made the case something different ; but yet declared, that they would not sustain the like in time coming.

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1671. June 24. MR ARTHUR GORDON *against* The LAIRD of DRUM.

MR Arthur Gordon, as assignee constitute by the executor of _____ Gordon, who had obtained decret, against the Laird of Drum, for payment of the sum of 7000 merks, contained in his bond, granted to the defunct, to whom Mr Arthur's cedent and another brother were confirmed executors, and had obtained decret against Drum, as conjunct executors ; but, in respect that the other executor was dead, Mr Arthur, as having right from the surviving executor, pursued for the whole.

It was ALLEGED, That the surviving executor had only right to the half of the sums confirmed ; because, the testament being executed, by the decret ob-

tained at the instance of both the executors, the half belonged to the nearest of kin of the conjunct executor, who was dead.

It was REPLIED, That a testament cannot be said to be executed by a decret, unless payment had been made ; which is the opinion of Sir Thomas Hope, in his Treatise, that *instrumentum non est executum* but by intromission of the executor ; and therefore, *jure accretionis*, the defunct's part did belong to the surviving executor.

The Lords did sustain the defence, notwithstanding of the reply, and found, That an executor, either sole or conjunct, obtaining a decret for payment to him of the defunct's debt, the testament is fully executed, and his creditors may affect the same ; or, if he die, it is *in bonis defuncti*, and belongs to the nearest of kin : and that the naked office of executry does only accrue to the surviving executor ; as it was found in a case of the Lord Southwall, who, as creditor, had arrested the executor's goods, who had obtained sentence, and [was] preferred, in respect of his diligence, to the proper creditors of the defunct, to whom the executor was confirmed ; albeit the competition was for the debts belonging to the defunct, for which the executor had gotten decret.

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1671. June 24.

STEVENSON *against* DOBIE.

STEVENSON, having comprised the lands whereof Dobie was tacksman, did pursue for maills and duties. It was ALLEGED for Dobie, That he was infest in an annualrent, and in possession before the compriser's infestment or diligence ; which being found relevant for proving his possession, *in termino probatorio*, at the advising of the cause ; It was ALLEGED for the compriser,—That the tack could not prove possession of the annualrent ; because the first term of payment thereof was after the compriser's infestment ; and so it could not be drawn back, there being *medium impedimentum*. It was ANSWERED, That the annualrenter being tacksman, and in natural possession, could do no diligence against himself for obtaining a decret of possession ; and therefore, his possession, from the time that he was infest, behoved to run, and make his annualrent clad with possession.

The Lords did repel the defence, and preferred the compriser ; and found, that the annualrent could not be clad with possession until the first term of payment was past ; but, if the annualrenter had obtained decret of poinding the ground against the heritor, the term of payment being elapsed, the case would have been more difficult.

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1671. July 4. MR WILLIAM DOUGLAS *against* The LAIRD of BALFOUR.

IN a pursuit, for maills and duties, of the lands of Airly, at the instance of the Laird of Balfour, upon a comprising whereupon he was infest ; compearance was made for Mr William Douglas, who had comprised the said lands *in anno* 1652 ; whereupon he ALLEGED, That he ought to be preferred ; because his comprising was expired long before the pursuer's right.