

cussed bond, that ought not to be made use of to constitute the debt against him. The Lords found the reason of reduction, as libelled, not relevant; and that a party lawfully imprisoned might grant a bond gratuitously, where there was no antecedent cause.

*Page 147, No. 531.*

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1682. *December 6.* GAVIN HAMILTON *against* the HEIRS of BONNAR.

JEAN Lockhart having commenced a process for 4000 merks, as the half of the tocher provided to return to her, in case of no children, by her contract of marriage with John Bonnar;—it was alleged for the defender, That the tocher could not return, because it was never paid. Answered, The wife must have the benefit of the provision, unless it were alleged that the husband had done sufficient and timeous diligence for payment of the tocher, and could not recover the same. Which answer the Lords found relevant. But the defender condescending afterwards, upon diligence, *viz.* that he had pursued Captain Lockhart, the debtor, when insolvent, who was the pursuer's uncle, before the Chancery of England, where the process depended three years;—the Lords sustained the diligence, and assoilyied, although the process was never brought to any determination: And had it been sooner intended, might have proved more effectual; but Captain Lockhart's condition altering unexpectedly, by the eviction, from him, of a considerable land-estate, and the process having been intended, within two years after the term of payment of the last moiety, against so near a relation, the Lords sustained the diligence as competent.

*Page 84, No. 347.*

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1682. *December 13.* ALISON and AIKMAN *against* LUDOWICK CANT.

In a competition between two base infeftments of annual-rent, confirmed in Exchequer in one day, but the one expedite a month before the other at the great seal, they were not brought *in pari passu*; but that which first passed the seal was preferred, unless it were made appear that the other was as timeously offered to the keeper of the seal. *Vide* No. 587, [Alison against Cant, March, 1682.]

*Page 164, No. 593, [1st.]*

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1682. *December 20.* LORD ROSS *against* KER of MORISTOWN, &c.

MR John Wilkie, having granted an assignation, to his creditors, of some debts due to him by Sir John Wilkie of Fouldown, which was intimated to the Lady Ross, his daughter and heir; and, thereafter, Mr John having restricted the said sums to the half, in favours of the Lord Ross;—alleged for the Lord Ross, That his lady being minor and married, intimation ought to have been made to

him, as husband, seeing he now competes upon a right, as creditor. Answered, Although, in cases where wives or minors are prejudged, and are *in damno vitando*, it may seem reasonable to acquaint the husband or curator, yet the want of that intimation to husbands or curators cannot be obtruded to third parties. And in this case the husband, who could not but come to the knowledge of the said intimation, as he would have been *in mala fide* to have paid the cedent; so himself being now debtor with his Lady *jure mariti*, was *in mala fide* to take any positive right or privative, by a discharge or restriction; and is not so favourable as another person, who innocently might have taken a second assignation, after the first was intimated. The Lords inclined to sustain the answer; but the point was not put to the vote, in respect the creditors insisted in their reduction upon the Act of Parliament 1621.

Page 20, No. 104.

1683. *January.*

ALSTON *against* ROSS.

FOUND, that, notwithstanding of the Act of Parliament, strangers may be arrested within burghs for their debt; but that a Scotsman born could not be arrested upon a bond granted by him, after he had resided year and day in Scotland; and that he was free, notwithstanding of caution given *judicio sisti*.

Page 14, No. 78.

1683. *January.* ARCHIBALD AINSLEY *against* DALMAHOY and HANNAY.

A PRINCIPAL and cautioner having granted a bond for money borrowed from Thomas Weir, in name of, and as pertaining to one Wallace, his brother-in-law, payable to Wallace or Weir;—the Lords found, That Thomas Weir, as *correuſ credendi*, might have uplifted the money from the debtor, and effectually discharged him thereof; yet he could not, without a factory from Wallace, assign the bond to the cautioner, upon payment made to himself. This was found *pro* and *contra*; but, at length, the factory was produced.

Page 20, No. 105.

1683. *January.* SIR JAMES TURNER *against* MR JAMES PILLANS.

A SECOND appriser claiming to come *in pari passu* with the first effectual appriser; it was alleged for the first, That the second appriser had intromitted several years with the whole rents, and could not share with him in time coming, till he had once intromitted with as much effering to his sum as the second appriser had gotten. Answered for the second appriser, That apprisers are only to share equally when they concur; and the first appriser has himself to blame that he neglected formerly to put in a share; and as, if the second appriser had been completely satisfied and paid by his intromissions, the first appriser would