

1686. *January.* BALMADIES *against* HALGREEN.

FOUND that an executor-creditor could only compensate upon such part of the debt as he had recovered sentence for in his own name, the testament not being *executum* till sentence is obtained.

*Page 127, No. 468.*

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1686. *January.* MARJORY MASON *against* JOHN MASON.

IN the reduction of a discharge granted by a relict the day after her husband's death, when she was travailing of a child under the midwife's attendance, *ex capite luctus*; and also upon this ground, that she was not *compos mentis*, by reason of her pains and showers;—the Lords, before answer, allowed a mutual probation, and that by women witnesses, in respect of the pursuer's circumstances at the granting of the discharge.

*Page 156, No. 563.*

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1686. *January.* BAILIE WEDDERBURN *against* BAILIE JOHNSTOUN.

JAMES Sutherland and Bailie Johnstoun being in copartnery with some others, Bailie Wedderburn raised a pursuit against Bailie Johnstoun upon a breviate of the books of copartnery, containing Charge and Discharge, all written with the defender's hand, the leger-books being lost. Alleged for the defender, That, as the abbreviate instructs the charge, so it must instruct the discharge, especially considering, that, though the copartnery dissolved in the year 1663, the pursuer had not, till of late, pretended to any debt against the defender. Answered,—Bailie Johnstoun having been both book-holder and cash-keeper, and received 10s. per tun for his service, which, during the copartnery, amounted to upwards of £1000 sterling; and the copartnery having been carried on, by the granting of bonds and drawing of bills, for many thousand pounds sterling, upon the joint credit,—the discharge must be instructed by retired bonds, bills, and discharges thereof, otherwise the parties cannot be secured. The Lords found, that the articles of discharge relating to writ, must be instructed by the writ, where writ is usually taken, and required for persons' security.

*Page 259, No. 918.*

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1686. *January.* THOMAS WATSON *against* JOHN DRUMMOND.

JOHN Drummond, factor, and Mr Jackson, of London, having, by way of a correspondence, drawn several bills upon one another, John Drummond fitted an account of debit and credit, specifying the particular bills, containing £500 of balance upon his own debit, which he subscribed, without any obligation to

pay, and sent it to Jackson : Jackson turning insolvent in a little time after, one Watson, his creditor, got the account, and pursued John Drummond for the balance. Alleged for the defender, That, since the account relates to bills as the ground of the debt, he could not be liable unless these bills were retired and satisfied ; for they might have been protested for not-payment, and so come back upon the defender, as one or two have. Answered, Bills of exchange not being protested and returned *debito tempore*, the drawer is free ; and, if the pursuer, who is a creditor to Jackson, and not master of the bills, were obliged to produce them, Drummond, by collusion with Jackson, getting him to keep up the bills though truly paid, could not be overtaken ; which were absurd. And two of the bills being only protested, though all were drawn a good time since, the rest are presumed to have been satisfied ; and the pursuer produces a bill, drawn by Drummond on Jackson, posterior to the fitted account, which is satisfied. Replied, Law prefixes no determined time for returning protested bills ; and the intimating the protest was only necessary in case the defender had had effects in Jackson's hand, to be drawn out of it *debito tempore* ; or to put the defender upon his guard, not to give Jackson new credit. 2. When Jackson, the bankrupt, collusively furnished the pursuer with the said account and bill, he would have furnished him with the other bills also, for clearing the balance, had they been retired and satisfied. The Lords found no process against the defender for so much of the balance as answered to the bills that were not returned to the defender, till such time as the said bills should be returned to him.

*Page 259, No. 919.*

1686. *January.*

CRAIGHALL *against* ATHERNIE.

ATHERNIE having suspended a bond granted by him to Craighall, for his entry, upon this reason :—That his lands being a part of the abbacy of Northberwick, which was annexed to the crown in the year 1633, the king is superior, and nothing reserved to the lord of erection but the feu-duties, till redemption ; so that the suspender hath mistaken Craighall for his superior ; and here the king's advocate concurs with the suspender. Answered, By the Act of Parliament 1661, there is an exception of such vassals as had consented, or should consent, to rights of superiority of church-lands, as importing a resignation of the property in favours of the superior ; and here the vassal, in the year 1634, made a formal resignation of the property in the king's hands, in favours of Craighall, then lord advocate, who was infest thereon ; which is much stronger than a bare consent mentioned in the Act of Parliament, and would have been a valid right, though there had been no such provision in the Act of Parliament for making consents equivalent to resignations ; for, at all times, resignations were lawful, even before the Act of Parliament. The Lords found the letters orderly proceeded, and the sum payable to Craighall, as superior, for the entry.

*Page 264, No. 940.*