

1746. July . POOR ——— against ———.

AN action of damages and oppression not competent against the heir, if an act was not extracted against the predecessor, though the cause had been pleaded before the Ordinary, and though the action was *rei persecutoria*. The reason given by Lord Elchies for the decision was, that, till liti-contestation, or an Act extracted, the heir could not know upon what the predecessor put his defence. The Lords were unanimous in this. Actor, Rob. Dundass.

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1746. November 7. DUKE of DOUGLAS against CREDITORS of LITTLE GILL.

[Elch., No. 11, *Writ*; Kilk., No. 8 and 12, *ibid.*; Falconer, No. 156.]

THE Lords found, (*Absent. Preside et Arniston,*) That, before the Act 1681, if two persons signed a deed, with the addition of witnesses to their names, their designations were supplyable by condescendences. For it was said by Lord Elchies, that, before the 1681, the solemnities of writs required by law, such as the designation of the writer and witnesses, and the naming of the writer, were only *ad fidem faciendam judici*; so that, if the deed wanted these, it *made na faith*, (as these Acts say,) but they were not absolute requisites that could not be otherwise supplied; and therefore, though the Act 175, 1593, absolutely requires the writer's name and designation to be inserted in the body of the writ, yet both the one and the other were supplyable before the Act 1681. This was the opinion of the Lords on the Friday, with relation to the point of law; but, as there was a point of fact they wanted to have cleared, they would not determine the cause that day. On the Tuesday following, Lord Elchies being in the Outer-House, they found, *in abstracto*, the designation of the witnesses not supplyable. But this was altered, January 6, 1747. *Preside presente*.

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1746. November 18. JACOBINA CLARK against EARL of HOME.

[Kilk., No. 16, *Adjudication*; Falconer, No. 161.]

THE Lords found, (*Dissent. Tinwald et Drummore,*) That the negative prescription here took place with respect to the apprising, and the debt that was the foundation of it, in so far as there was no possession, and therefore assolyied the defender.\* As there had been infetment on this apprising, and the legal expired, Elchies was of opinion, that the positive prescription by Lord Home and his authors excluded Jacobina; for he thought that, at the

\* This judgment reversed in the House of Lords.