

by obtaining himself executor confirmed, to the effect he might get payment of his just debt, and that he had accordingly obtained payment, therefore he was preferred without division with the rest.

*Act.* ———. *Alt.* Burnet. Hay, *Clerk.* *Vid.* 13th July, 1632, Pollock *against* Fairholm; 7th January, 1624, Shaw *against* Gray; and 26th January, 1628, Adie.

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1628. *February* 28. MAULD *against* L. MATHERS.

IN a pursuit of letters conform, Mauld *against* Mathers, Mauld being constituted assignee to a pension granted to Andrew Mauld, father to the assignee, which Andrew had the said pension from the E. Marishal, *cum potestate transferendi etiam in articulo mortis*;—the Lords sustained this action at the assignee's instance, being now pursued after the cedent's decease, the principal pensioner; albeit it was alleged, that the cedent being now dead, that the translation was null; seeing the cedent remained still in possession, notwithstanding of the translation, by uptaking thereof, and giving acquittances thereon, in his own name; so that the translation took never effect in the maker's lifetime, whereby it became ineffectual. This allegiance was repelled, and the action and translation sustained; for this summons of letters conform was raised before the cedent's decease, and thereby the assignation was intimate; whereas, for want of intimation, the contrary was found before, in the action Douglas *against* the B. Aberdeen. *De quo vid. penult* June, 1622.

*Act.* Oliphant. *Alt.* Mowat. 17th December 1628, Chalmer *against* L. Craigivar.

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1628. *March* 6. NICOL *against* HUME.

NICOL, pursuing some of the Laird of Aiton's tenants, to make their farms addebted by them to the Laird, their master, forthcoming, as arrested in their hands by the pursuer, for a debt owing to him by the Laird;—in this process compears one Hume, creditor to the Laird, and who had arrested thir same farms, and alleged that the pursuer had obtained a decret for farms arrested in the tenants' hands, of another year preceding, which would extend to a greater quantity than would satisfy his debt; and so he ought not to misken that sentence, whereby he might be paid, and *de novo* again arrest, thereby to pre-judge other creditors. The Lords found that the pursuer, having recovered a decret for his debt, as said is, ought either to renounce the same, or to assign it to the party, or qualify and instruct some competent reason why the same cannot be available to him: or, if he would not, but that he did adhere thereto, that he could not arrest, *de novo*, for satisfying of that same debt, whereof he behoved to be found satisfied by that sentence, which he could not show he could be frustrated in the execution thereof; it being in his own default, that

he wanted payment. The Lords found, that he could not prejudge other creditors to arrest and seek payment of their debts by his several arrestments, thereby to elide and defraud them.

*Vid.* the cases wherein, after comprising, other execution may be sought.

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1628. *March 11.* DALMAHOY and FRANK *against* HORSBURGH.

IN an action, Dalmahoy, and Frank her spouse, *against* Horsburgh, for the mails and duties of a tenement of land, wherein the pursuer was infeft as heir to her brother; and the defender alleging, that he was retoured heir to his predecessor, who was infeft in the same lands, and that the defender, by virtue of his infeftment passed upon a retour, had been five years in possession of the same;—the Lords repelled the allegiance, in respect that the pursuer was infeft as heir to her brother, and that he was infeft in the same land, before the excipient's author's right, and, by virtue thereof, that he was in continual possession ten years together of the same, to the time of his decease, who died *in anno* 1623; and that all the years since then, whereof the defender had acquired only possession, were now controverted in this process, and could not make the excipient to be counted a lawful possessor. Which reply was found relevant in this possessory judgment.

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1628. *March 13.* KER *against* The LAIRD of COLDINGKNOWS.

A DECLARATOR of liferent of some lands pertaining to Coldingknows, holden of the abbacy of Dryburgh, being sought by the Earl of Marr's donator, the abbacy being erected to the Earl of Marr, who thereby became Coldingknow's superior;—in this cause, John Boswell of Pittodrie compearing to exclude the donator, in respect he had comprised the same lands from Coldingknows, for debt owing to him, whereupon he was infeft by the king, who was Coldingknow's superior; for he found Coldingknows standing infeft, holden of the king, by virtue of the act of annexation, whereby he alleged he could not enter by another superior, than him of whom he found his debtor, from whom he comprised, standing infeft. This allegiance was repelled, and the liferent found to pertain to the donator constituted by the lord of erection, notwithstanding of the compriser's infeftment and his author's, holden of the king; for, by the erection which preceded both the comprising and the infeftment taken thereon, the king ceased to be superior, and the right of superiority belonged to the lord of erection, whereby the compriser, not being infeft by the right superior, it could not prejudge the true superior, *viz.* the Earl of Marr the lord of erection, nor his donator, in his vassal's liferent.

*Act. Hart. Alt. Sandilands. Gibson, Clerk. Vid. 24th July 1632, Ja. Reul.*

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