

No 91. creditors, would not have set the land so far within the worth ; and so the nullity was received by way of exception, notwithstanding of the foresaid answer and qualification of possession.

Act. Craig.

Alt. ———.

Clerk, Gibson.

Fol. Dic. v. 1. p. 177. Durie, p. 395.

1664. June 17. TULLIALLAN and CONDIE *against* CRAWFURD.

No 92.

A discharge which had been rejected in a suspension, but extract superseded to give time to instruct it ; not being instructed within the time, was not afterwards, when instructed, received in defence against a declarator of an apprising.

TULLIALLAN and CONDIE pursue a declarator of an apprising led against them, as satisfied and paid within the legal, by intromission, and as an article adduce a discharge of a part of the sum appraised. The defender *alleged*, That the allegiance was not now competent, because it was *res judicata*, before the Lords of Council and Session, in *anno* 1637, where the same allegiance being proponed in a suspension,

THE LORDS found not the same instructed, and therefore found the letters orderly proceeded, yet conditionally superseding execution of the decret till such a day, that, in the mean time, if the same were instructed, the instructions should be received ; and nothing was produced during that time, so that it cannot be received more than 27 years thereafter to take away an apprising clad with long possession, and now in the person of a singular successor.

The pursuer *answered*, That his declarator, founded upon the said article, was most just and relevant, it being now evident, that the sum appraised for was paid in part ; and as for the point of formality, albeit in ordinary actions, where terms are assigned to prove, and so a competent time granted to search for writs, if certification be admitted regularly, it is valid, and yet, even in that case, the LORDS will repon, upon any singular accident, in a suspension, *ubi questio non est de jure, sed de executione*.

THE LORDS would not delay execution unless the reasons be instantly verified ; Yet *in petitione* will not take away the right.

THE LORDS sustained the defence, and would not sustain the foresaid article, in respect of the decret *in foro contradictorio*, though, in a suspension here, there was no allegiance that the writs were new come to knowledge, or newly found, nor could be, because it was alleged in the decret.

*Stair, v. 1. p. 200.*

1671. November 29. JUSTICE *against* BOYD.

No 93.

It was not found competent by exception, but

THERE being a wadset granted by Ludovick Keir to Dr Scot, the right of the wadset was appraised by John Boyd, who pursues the tenants for mails and duties. Comparance is made for Bailie Justice, deriving right from the reverser,