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A discharge which had been rejected in a suspension, but extract superseded to give time to instruct it; not being instructed within the time, was not afterwards, when instructed, received in defence against a declarator of an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 apprised. The defender *alleged*, That the allegeance was not now competent, because it was *res judicata*, before the Lords of Council and Session, in *anno* 1637, where the same allegeance 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 decreet 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 apprised 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 repone, 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 decreet *in foro contradictorio*, though, in a suspension here, there was no allegeance that the writs were new come to knowledge, or newly found, nor could be, because it was alleged in the decreet.

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 apprised by John Boyd, who pursues the tenants for mails and duties. Compearance is made for Bailie Justice, deriving right from the reverser,

No 93.
by declarator, that a wadset was extinct by intromission.

who *alleged* preference, because he offered to prove the wadset satisfied and extinct, in so far as it being burdened with a back-tack, the wadsetter, without consent or authority of law, had entered in possession, and his intromissions did exceed the whole sums of wadset, principal and annualrent.—It was *alleged*, That this allegeance not being founded upon any article in the contract of wadset, but upon an unwarrantable intromission of the pursuer's author, it is not receiveable by way of exception, but by action of declarator of the expiring of the wadset by satisfaction; for though the Lords have sustained the satisfaction of apprisings by exception or reply, they have never done so in wadsets.

THE LORDS found the defence not competent by way of exception.

Fol. Dic. v. 1. p. 177. Stair, v. 2. p. 13.

1683. *March* 13. SIR DAVID THOIRS *against* SIR ALEXANDER FORBES.

No 94.
In a competition betwixt two creditors on an estate, the one founding on a base infeftment of ward lands, and the other repeating a declarator of recognition he had against him, the Lords received the declarator even *hoc ordine*.

SIR DAVID THOIRS's action against Sir Alexander Forbes of Tolquhon is referred to Redford, to hear them on the reason of minority and lesion, through the disposition made by Tolquhon; and that being proven, then ordained them to compt and reckon together, anent the onerous adequate cause paid by Tolquhon for the same. *See* IMPROBATION.

December 20. 1683.—The case between Sir David Thoirs advocate, and Sir Alexander Forbes of Tolquhon, being reported by Redford; the LORDS found, by the qualifications alleged on, That Tolquhon did act as pro-tutor, and therefore must have no more allowed for the gift of the ward, but what truly he paid for it to Sir William Purves, and grant diligence for citing Sir William Purves to depone what he did get therefor; as also ordain Tolquhon to depone thereanent: And find, That Tolquhon must compt for his intromissions with the rents of the ward-lands; and as to the article of the inventory of debts founded on by Tolquhon, to make up the onerous cause of his disposition, find it must be allowed to Tolquhon, as a debt to affect the minor, he instructing that he paid them out; which he doing, he is to have allowance thereof out of the rents of the lands uplifted by him; and if the rents do fall short, the minor is to be liable for the superplus; and remit to the Reporter to consider the instructions that the debts in the inventory are paid by Tolquhon, and to allow what he shall see instructed; and find, That Tolquhon's obligation to relieve the minor of his second brother's portion was a lesion, in respect he was not obliged to pay the debt; and find, That Tolquhon must compt and reckon notwithstanding of his defence founded on his expired comprising, in respect of the posterior transaction for the sum of 10,000 merks, which the LORDS allow him with the annualrents; though that transaction was never fulfilled to him, seeing he hath not obtained a declarator annulling it on that head.