

bond *pro tanto*. As it was not *metus injustus seu illicitus*; so *ex l. 13, p. 1mo, D. de Injuriis, Executio juris non habet injuriam. Vide supra, No. 337, [Macintosh against Spalding, 13th June, 1672.] Petrus Peckius de jure sistendi, capite 43. Vide 27th July, 1678. Advocates' MS. No. 363, folio 148.*

1672. July 10.

ONE convening the fourth son of his debtor, to pay him a sum owing to him by his father, it was ALLEGED, That no process could be sustained against him, because he was not heir, nor could he be heir. REPLIED, That he had got a patrimony from his father, and so ought to pay this debt *in quantum lucratus est*. DUPLIED, That passive title was never heard of; 2do, *Esto*, he were heir of provision, the heirs of line behoved to be discussed ere any process could be got against him. TRIPLIED, He needed not discuss the three elder brothers here, because they were all bankrupts. They were to have the Lords' answer on it.

The Lords refused process with indignation.

*Advocates' MS. No. 364, folio 148.*

1672. July 10.

Anent CAUTIONRY.

IN the same action it came to be questioned, where a man is inserted in the body of a writ, and designed cautioner, and subscribes only witness; if that writ will bind him as cautioner. It is thought, albeit he has not designed to become caution, yet, in regard he should read the paper whereto he is desired to subscribe as witness, the subscription will bind upon him as cautioner. Yet this seems hard. *Vide infra, No. 394, [Rae against Glasse, June, 1673.]*

*Advocates' MS. No. 365, folio 148.*

1672. July 11. SIR WILLIAM FLEMING *against* ZAIR.

SIR WILLIAM FLEMING, Commissary of Glasgow, pursued a declarator against one Zair, his clerk, to hear and see it found and declared, that by the instructions given to the commissaries *in anno* 1666, the profits of all summons, sentences, transumps, registrations, confirmations of the seal and signet, and all other such benefit, shall be divided thus, two parts to the commissaries, and one third part to the clerk.

The Lords declared conform to the instructions.

Which decision has awakened the commissaries of Edinburgh to fly to and get