

whose hands the writs were depositate and consigned, that they were not to be filled up nor delivered, till a count had preceded between them.

ANSWERED *1mo*,—His bond cannot be taken away but only *scripto vel juramento*. *2do*, He will yet instruct he was either debtor to him, or bound to relieve him, for as much as the sum filled up in the bond; and that before the filling up of it.

REPLIED,—These debts must be before the inhibition served against the common debtor, by the Town of Hamilton, else they cannot be allowed.

DUPLIED,—The inhibition is null; because it does not bear a publication at the market-cross where he then staid, *viz.* Rutherglen, within which prison he then was. See Lanfrancus Balbus, *Decisione* 494.

TRIPLIED,—They needed not but at the place where he had *domicilium*, (for in prison he had it not, that being *mala mansio et involuntaria*,) *viz.* at Hamilton, where his wife and bairns dwelt, the inhibition was published.

Newton found it a sufficient publication that was made at the market-cross of the principal burgh of the shire or regality where he had *focum et larem*; the inhibitor proving always, that Nasmith, before he was carried prisoner to Paisley, had his ordinary residence within the regality of Hamilton. And as to the first, ordained Hendersone (for though, *pendente lite*, it was assigned to and it judicially produced, and the rest of the acts of the process carried on in the assignee's name, yet it was declared that assignation should not prejudice us of any defence competent against the cedent, nor of his oath,) to depone if the bond was blank and depositate; and, in case he confess this, then ordains the depositary, witnesses, and fillers up of the sum of the bond, to be examined upon the conditions. See the information of it.

The Lords allowed Hendersone (since the sum was proven to have been filled up without the debtor's knowledge,) yet to instruct the onerous cause, and that Nasmith was his debtor in as much as his half of the bond came to.

*Advocates' MS. No. 707, folio 315.*

1678. *January.* DUNDAS *against* HOLBORN of MENSTRIES.

IN a case of one Dundas against Holborn of Menstries, about some levy-money in 1649; the Lords found, in so old a debt, they behoved to libel resting owing unpaid; because it is presumed such money was presently expended. *Vide supra, July 1669, Bonar against Clelland.*

*Advocates' MS. No. 709, § 1, folio 316.*

1678. *January.* ANENT EXECUTORS and TUTORS.

AN executor or a tutor assigning bonds of the defunct's or minor's, no execution ought to be granted thereon, till the cedents clear their counts, that they are creditors, or have a right; for they may be found paid by their intromission.

*Advocates' MS. No. 709, § 2, folio 316.*