

1679. *December 3.* PATRICK and HENRY HUMES *against* RENTOUN of LAMBERTOUN.

THE Lord Rentoun, Justice-Clerk, having obtained decret against umquhile Lambertoun, as having intromitted with his woods and rents *in anno* 1638, and not having counted therefor to the public; and thereupon having apprised Lambertoun's estate, and having disponed the right to Mr Patrick and Henry Humes: Lambertoun gives in a bill of suspension of the decret, with a reduction thereof, and of the apprising following thereon, upon this reason, That it was unwarrantably extracted, omitting the material interlocutor, *viz.* That if, betwixt and such a time, 18,000 merks were paid, it should be accepted for the whole sum contained in the decret: which was referred to the knowledge of some of the Lords. And he, not adverting thereunto at the extracting, and not satisfying the said sum within that certain time, Lambertoun being then a pupil; he ought now to be restored.

The Lords repelled this reason; and found that the decret could not be altered upon the memory of any of the Lords, except *de recenti*.

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1679. *December 4.* GEORGE M'CALLA *against* MARION DICKSON.

GEORGE M'Calla, by his contract of marriage with Margaret Cockburn, having an obligation of Mr William Cockburn, for payment of 1000 merks, as a part of his tocher;—after the decease of Mr William, Marion Dickson, his spouse, surviving, he pursues the said Marion, as executrix confirmed to the said Mr William, to make payment to him of the same, upon his security to pay her the annualrent thereof during her life; or otherwise, to find him caution for the sum after her death: in respect that she had paid the remanent children's portions, and so would have no visible estate after her death.

The defender ALLEGED, No process for this sum before the term; and, if such processes were sustained, it would give a great trouble to the lieges, upon the like pretences, to secure the sums before the term of payment: which was never done, nor justly can be done, *quia plus petit qui ante terminum petit*.

It was ANSWERED, That, whatsoever might be done, in case of debtors for their proper debt, it is most just that executors, who have but an office to administer a defunct's estate, which is not their own property, but in custody and trust,—should secure the defunct's creditors even before the term.

It was REPLIED, That the executrix had found Mr John Cockburn cautioner in the testament, who is abundantly sufficient to secure all the defunct's creditors; and she could be urged no farther.

The Lords found, That if there could be no just objection against the cautioner, the executrix was no farther obliged before the term; but, if there were, they ordained the executrix to secure 1000 merks to herself in liferent, and to George M'Calla in fee.

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