

twixt and the 20th of March, after consideration of the defunct's condition, to determine the legacy to be paid by the executor to the said Janet, pursuer, the defunct's sister; and that at the sight of the Lord Reporter; in regard the defunct, by his testament, hath left the nomination of the quantity of it to the said Captain; wherein if he fail, (he being required, by a notary and instrument, to do it,) that the will of the dead may not be rendered ineffectual, they recommend to the Lord Reporter, *ex religione boni viri*, after hearing of the parties, and considering the condition of the defunct's fortune and estate, (whereof we gave in a condescendance,) to modify and determine these legacies.

Some alleged the legacy was extinct and void, the Captain refusing to give his determination: but that is contrary to *lex 1. D. legat. 2.* where a legacy *in arbitrium tertii collatum* is valid, though he do not arbitrate. It is true, *emptio ita in alterius arbitrium collata non valet.* Vol. I. Page 178.

1682. November 10.—In the action pursued by Janet Alison, mentioned 10th March 1682; the Lord Redford, being allowed to modify her legacy, after consideration of the defunct's estate, and the inventory of the testament and his count-book, amounting in all to £16,000 Scots, and the condition of the family, being only himself and a wife; he divided in two halves, and modified to her the half of the dead's half, *viz.* £4000 Scots, she being his sister, and without deduction of a proportional part of the debt if condescended on; and ordained her to take a share of good and bad in the inventory, with as much equality as might be. Vol. I. Page 194.

1678 and 1682. ALEXANDER HOME OF LINTHILL *against* ALEXANDER AITKENHEAD and ANDREW MUNRO.

1678. November 12.—Linthill's father was commissary of the Merse or Berwickshire. Major-general Monro lying there with his regiment, he got a precept from the Estates, drawn upon Linthill's father, for the sum of He accepts it, and gives him a part of it in money, and grants his bond, or ticket, for £1400, which was the remainder thereof, with this quality, that he should pay it, if he got that precept allowed to him when he came to make up his accounts with the public. *Ita est*, he accordingly got it allowed.

The Lords found Linthill's father's accepting of the public's precept, and getting it allowed, equivalent to payment for an equivalent debt owing to him, though he never got payment thereby; and also decerned in the annualrents since the payment, in regard of his declaration, that, how soon he got payment thereof, he should account for the same: only, because, by the balance of the account, Linthill's father was found super-expended, they allowed him to retain a part proportionally and *pro rata* effeiring to the other articles of the account, (which will deduce about £200 Scots off the foresaid bond.)

Sir G. Lockhart, in his information for Linthill, used thir words:—It is a wonder to astonishment, that such an umbratile, fictitious, imaginary, and stramineous kind of payment as what is inferred by accepting a precept, shall not only have the force of a real solution, but also infer an obligation upon the acceptor

for payment of annualrents, when there was none stipulated, and neither *lex* nor *pactum* for annualrents.

Of this decision, as of many others, all the reason that can be given is, *quod sic visum est superis*. *Vide infra*, 15th Nov. 1682. *Vol. I. Page 19.*

1682. November 15.—Between Alexander Home of Linthill, and Mr Alexander Aitkenhead, and Monro, (mentioned 12th of November 1678;) the Lords, after a long debate, religiously adhered to their former decret *in foro*; and found all now proponed either formerly proponed and repelled, or else then competent and omitted; and so repelled it, and refused to reduce their decret, unless they condescended on nullities, informalities, or trinqueting in false extracting. *Vide 8th Dec. 1682, Paton*. Yet see the contrary done for the *Marquis of Queensberry*, 20th Dec. 1682. *Vol. I. Page 195.*

1682. November 16. SIR JOHN NISBET of DIRLETON and SIR JOHN SETON of GARMILTON *against* ANDREW MARJORIBANKS, &c.

SIR John Nisbet of Dirleton, and Sir John Seton of Garmilton, as creditors to Mr Andrew Marjoribanks, pursue a reduction, against him and his children, of a disposition he had made, giving them the fee of his lands, and declaring their succeeding or meddling should infer no behaviour, or passive title on them.

The Lords reduced it as fraudulent.

Vol. I. Page 195.

1682. November 21. WILLIAM GAIRDEN and SIR JAMES KEITH *against* IRVINE of DRUM.

IN the competition arising on the process of maills and duties pursued by Mr William Gairden, minister in Edinburgh, and Sir James Keith his cedent, between them and Irvine of Drum; the Lords, upon Castlehill's report, brought in Keith's comprising *pari passu* with Jousse's which Drum had acquired in; because, though it was neither within the year and day before nor after it, yet they found it sufficient that it was deduced and led before the first effectual comprising, and its priority in date before the first said effectual apprising ought at least to give it the privilege of *pari passu* with that whereon charge and infestment had been first taken.

This has been oft so decided. And they found Gairden and Keith were not instantly obliged to pay down their proportional parts of the expenses of the said preferable apprising and its infestment, ere they could have the benefit of coming in *pari passu* with it; but that they might allow the said preferable appriser to possess and uplift the maills and duties aye and until he were paid of these charges and debursements; and then, after that, brought them in *pari*