

of the adjudgers were yet infest, he had an interest to desire his adjudication may be passed, because then he could give himself a preference, by expeding the first infestment.

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1693. *February 16, and November 29.* SIR ROBERT BAIRD OF SAUGHTONHALL, *against* MORISON OF PRESTONGRANGE.

THE Lords thought, the presumption adduced by Sir Robert, that this was not the bond on which the comprising was led, was elided by the contrary presumptions, especially by Barberson's ratification : and the President and others inclined not to annul, but to lay open Prestongrange's apprising on that head, that his author had comprised for more than was due,—*viz.* for the penalty, which was not contained in the decreet of suspension : though some argued, that the letters having been found orderly proceeded for the principal sum and annualrents, and nothing mentioned of the penalty, and he not being assoilyied therefrom, the suspension did not hinder real diligence, by adjudication, for the same ; and that the Lords might yet advise whether it was due or not. And, before answer to that nullity against the inhibition, that it was only served on a general charge to enter heir, which can be no sufficient ground nor foundation for an inhibition :

The Lords, before answer, ordained the inhibition and general charge to be produced, that they might see if it contained any special sum, and then to sustain it, as was done in 1684, between the Lord Ballenden and the creditors of Preston against Arniston ; but if it proceeded only on a general narrative, without a special sum, then to find it null. In this case was also cited, the decision in 1690, Sir James Cockburn and Bonhard, against Sir Walter Seton, &c.

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*November 29.*—Sir Robert Baird's reduction of Morison of Prestongrange's right on the lands of Dauphington was debated and decided. The nullities were :—That the bond mentioned in David Wilkie's apprising, as granted by Mr George Barber to him, bore to be registered in the Commissioners' books, for administration of justice, in 1652 ; at which time the principals were given back : and extracts did not prove : whereas the bond now produced as the ground and warrant of that apprising, was registered in 1650 ; and, having searched the registers that year, they cannot find the principal bond. Likeas, this extract produced does not bind Mr George himself, but only his heirs.

ANSWERED.—All this is but a mere mistake of the writer of the extract ; for the parties, the sum, the term of payment, and all are the same and agree ; unless they allege there was another bond. And there was a probable reason for this mistake ; seeing there was another bond of a different sum registered in 1654.

The *second* nullity was, that the comprising was led against Mr George Barber, who was only liferenter of the lands ; whereas his son was fiar.

ANSWERED.—The father had a faculty to revoke and alter the fee at his pleasure.

REPLIED.—That was personal, and not comprisable by a creditor, and could not accresce to them.

The *third* nullity was, that the comprising was led for more than was due, he being decerned for the penalty of the bond; whereas the decret of suspension finds the letters orderly proceeded only for the principal sum and annualrent, without the penalty. ANSWERED.—It does not assoilyie from the penalty, nor suspend the letters *quoad* that; and so it was still due.

The pursuers first insisted to have the comprising annulled on thir grounds complexly; but afterwards declared they only used them to restrict the comprising and cut off the legal.

Some of the Lords thought lesser nullities than thir had opened comprising. But the plurality, considering that this was no more a competition between two creditors, but that the lands had been bought on this right, and transmitted through four or five several hands, and each had made improvements, looking on themselves as proprietors irredeemable; therefore they repelled the hail nullities, and did not find them so much as sufficient to restrict the comprising; seeing the note of the registration seemed only to be an error of the writer, and that the faculty was apprisable, and that the decret of suspension did not liberate them from the penalty, though it spoke nothing of it.

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1693. *November 30.* SIR JOHN CLERK of PENNYCUICK, Petitioner.

SIR John Clerk of Pennycuick gave in a petition, representing he was the most considerable creditor on the Wrights-houses, and that the tenant was removing; and he could not get the same rent; therefore craved he might be allowed to set it at the best avail, for as much as he could get for it, and to uphold and repair the houses that were falling in decay.

The Lords refused the desire of the bill, and left him to do as he would be answerable; for they were not to be curators for all the broken estates in the country, and to be factors to set the lands: their design being to get the Lords' warrant for their actings.

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1693. *November 30.* WILLIAM CRIGHTON of CRAWFORDSTON *against* GIBSON of AUCHINCHYNE.

WILLIAM Crighton of Crawfordston, being infest in a common pasturage forth of the adjacent lands of Gibson of Auchinchyne; in a declarator, contended, that, by virtue thereof, he had not only summer-grass for his beasts, but had been in the constant and immemorial possession of tilling so much of the servient lands, and sowing it; as also, of mowing the meadows thereof, that thereby he might be furnished with straw and hay for the winter-feeding of his cattle. And it being ALLEGED that these were acts of property, and that a servitude could never carry a right to do such deeds, and was not so much as a title for the great prescription; and so he could not be allowed a term to prove