the Lady Cardross on retention, That her father was cautioner to Sir John Nisbet of Dirleton for Mr J. Stewart of Kettleston, his brother, in £10,000 Scots, and whereof she is not yet relieved.

ANSWERED,—1*mo*, No distress, *ergo* no retention. 2*do*, Not competent against the pursuer, who is a singular successor; however it might have met Kettleston the cedent. 3*tio*, It was competent and omitted, in the decreet for payment obtained by Sir George Mackenzie against her brother, and so not proponable now. Likeas, Dirleton, *voce* Compensation and Retention, thinks them not receivable in this case.

REPLIED to the *first*,—Distress shall be instructed; and, *esto* it were not, *frustra petis quod mox es restituturus*. 2*do*, She and her brother were but the heirs of the cautioner, and might be probably ignorant of this debt; and *noviter veniens ad notitiam* is always received. 3*tio*, Though that decreet bears a conclusion and decerniture of payment, yet that is not so much as craved in all the four neuks of it; but the whole debate goes on the articles of the improbation, *et judex nunquam impertit officium nisi rogatus*. As to the points of falsehood then insisted on, see some of them marked in the decision, 7*th February* 1672, *Kettleston*.

The Lords found such variety of points in this debate, and that it dipped on the extent of gifts of escheat, how far they might be preferable to creditors, which is of very dangerous consequence, and yet, in some cases, may be favourable; therefore they declared they would hear the cause in their own presence on the 5th of June next. *Vol. II. Page* 321.

February 27.—In the action mentioned 1st current, Sir John Hay of Alderston against the Lady Cardross, there was a bill given in by the Lady, bearing, she had raised a new reduction and improbation of Kettleston's bond; and had ground to believe it was but a copy made by Mr Patrick Falconer, keeper of the minute-book; and that he had long deponed so, but his oath was abstracted and amissing. Therefore craved he might be reëxamined on his knowledge of the making up of this bond, wherein he was made an innocent tool.

ANSWERED,—1*mo*, No such examination could be taken, to lie *in retentis*; seeing the process was neither seen nor returned. 2*do*, It was *lis finita et judicata* by a former decreet. 3*tio*, The principal bond was not in the field, without seeing of which he could not depone. Likeas, he behoved to get up his former deposition; neither is he valetudinary, that he needs to be instantly examined; and, at best, he would only be a single witness.

The Lords refused to examine him in this state of the process.

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1706. *June* 8. JOHN BUCHANAN *against* WILLIAM WRIGHT of FASKIN.

MR John Buchanan, writer in Edinburgh, pursues Mr William Wright of Faskin, doctor of medicine, for 700 merks owing him by Mr James Wright of Kerse, the defender's brother, whom he represents, for disbursements of law, and his pains, in defending him against John Callander's gift of recognition of Craigforth; and, having no written instruction for the debt, he refers the libel and

promise of payment to Doctor Wright's oath; and a day being taken to produce him to depone in January last, the term was circumscribed against him for not compearing: but conditionally, not to be extracted till the 5th of June; that if he compeared betwixt and that time, he should be admitted and received. He now gives in a bill, with a testificate of his indisposition and inability to travel, and craves a commission to depone at Glasgow, where he dwells.

ANSWERED,---No respect to his testificate, being impetrated from chirurgeons depending on him; and it is notour he goes up and down the city of Glasgow visiting the sick; and although he cannot ride, yet he may come in by coach. And the debt will be lost if a commission be granted; for Mr Buchanan has two persons who heard him say to confront with him, for refreshing his memory, which two he cannot persuade to go to Glasgow; so he must depone here.

The Lords thought the commission was too long a-seeking, and that the testificate was not positive: therefore they refused it; and prorogated the diet for his coming in till the 1st of July next, but so as to keep the circumduction fast. But the doctor offering to be at the expense of their journey to Glasgow and back again, to be confronted with him, the Lords, in these terms, gave him a commission; and, in case he should die before that time, that the decreet holding him as confest should go out against him and stand good, notwithstanding the prorogation of the term as to his deponing, that being only given him *ex gratia*. *Vol. II. Page 332.*

1706. *June* 11. ANDREW ABERDEEN and OTHERS *against* HELEN SHAND and her HUSBAND.

MR Andrew Aberdeen, and the other heritors and magistrates of the town of Old Aberdeen, pursue a declarator against Helen Shand and her husband, to hear and see it found and declared, That they have the undoubted right to the ground on which they have founded their tolbooth and new prison; and that the said market-place and streets belong to the community of the said burgh, and not to the said Helen; and that, therefore, she and her husband be discharged to impede, hinder, and interrupt the building in all time coming; and to refund their damages in stopping the said work, and the expenses of plea.

The defender raised a counter-declarator, ALLEGING, The ground on which the town was building the new tolbooth and prison was no part of their common good, but belonged to her in property; and that she has the houses adjacent, whereof she is heiress; and if the ground be Shand's property, then *inædificata solo cedunt soli illius domino;* and her tenants threaten to give over if the said work proceed; because they will be hourly disturbed with the noise of the clock and chime of bells.

The Lords, before answer, allowed a conjunct probation as to the property or commonty of the said ground. And accordingly the town adduced several witnesses, who proved, that, these forty years back and more, the said ground was ever reputed to belong to the town; and that in the year 1649 they had built a house thereon; and never knew them interrupted till the year 1702, that this woman and her husband pretended right thereto.

The Lords found the town had right to this ground, and therefore decerned