

Which the Lords sustained, and found that his estate might be affected with his debt. *Vol. II, Page 652.*

1678. *December 6.* JOHN LAW *against* MARY SMITH and FERREIS.

JOHN Law having charged, upon a decret of the bailies, against Mary Smith his taverner, and Ferreis, her cautioner; the cautioner suspends, on this reason, That, by the taverner's count-book, written with the charger's hand, there are several sums not allowed to her in this decret: and that, at her removing, she left a quantity of wine, which was gauged by two gaugers, and yet it was referred to the charger's oath, the quantity and value of the wine; which was probable by gaugers.

The charger ANSWERED, That he opposed this decret *in foro*, wherein there is compearance both for the taverner and cautioner, who was not only cited at first, but thereafter cited personally, to hear sentence.

It was REPLIED, That the decret mentions no warrant for the procurator, nor any writ produced for him that might infer warrant.

The Lords admitted the allegiance for the cautioner, unless it were instructed, by his oath, that he gave the procurator warrant to compear for him.

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1678. *December 11.* GRANT of CORIMONY *against* MACKENZIE of SUDDIE.

[*See page 236.*]

IN a suspension and reduction, at the instance of Mackenzie of Suddie, and Grahame of Drynie, against Grant of Corimony, of a decret of spuilie pronounced by the Lords, upon probation by witnesses, which is before mentioned, debated and decided upon the 30th day of November last: It was further alleged, for Mackenzie of Suddie, that the foresaid decret, as to him, was in absence: for, though the process was returned by Mr Roderick Mackenzie, junior, indefinitely for the defenders, yet it is offered to be proven by his oath, and he hath already given his declaration, that he was never employed nor informed by Suddie; and therefore, being to him as a decret in absence, the Lord sought again to consider the testimonies: by which it would appear, that there was not any thing proven against him.

It was ANSWERED, *1mo.* That when an advocate doth return a process for the defenders, if his oath or declaration may loose that, it would insecure all the decreets *in foro*: for though that hath been sometimes sustained before subscribed returns, when it depends merely upon the clerk to mark for whom advocates compeared, yet it neither hath, nor can be admitted, since advocates have been accustomed to subscribe the returns of processes, and so may, by the return, declare for whom they compear: but when it is indefinite for the defenders, it must be for all or none of them. *2do.* Though the decret had been without all compearance,—the spuilie being proven by witnesses,—there can never be

a reason sustained, that it was not proven without publication of the testimonies, and without redarguing the Lords with iniquity. And therefore, though, in decreets in absence, defenders may be heard when the probation was by writs, which are always published, and not so accurately considered in absence ; or though the party absent may propone a defence eliding the libel, though proven : yet, it being the Lords' sole trust to advise probation by witnesses with close doors, without publication or dispute upon the testimonies, wherein they use a like accuracy in all cases, seeing the parties are not to know what are in the same testimonies ; therefore they can sustain no reasons against the probation by witnesses, even in decreets in absence.

The Lords repelled both these reasons, and adhered to the decret, and found the letters orderly proceeded.

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1678. *December 17.* SIR ALEXANDER HOME *against* Mr PATRICK HOME.

UMQUHILE Lord Rentoun, Justice-Clerk, upon consideration of the indisposition and weakness of his eldest son, Sir Alexander Hume, granted a tack to his second son, Mr Patrick, of his whole estate, for payment of an annuity to Sir Alexander for his aliment, and the rest of the rents to the creditors : Whereupon there being a connt and reckoning betwixt Sir Alexander and Mr Patrick, Mr Patrick proponed a total defence,—That he had the sole right to the estate of Rentoun, by a disposition granted, by Sir Alexander to Frank Stuart, of the lordship of Coldinghame, comprehending the barony of Rentoun ; by virtue of an apprising of the said barony of Coldinghame, comprehending as said is ; and for all other right, title, and interest the said Sir Alexander had to the said barony of Coldinghame, comprehending the said lands of Rentoun and others ; or to any part thereof, in any manner of way : and to which disposition the said Frank Stuart had made the said Mr Patrick Hume his assignee ; whereby Sir Alexander was excluded from any interest he had in the lands of Rentoun, any manner of way.

Sir Alexander having raised reduction and declarator, that the foresaid disposition granted by him, could not be extended to the property of his own estate of Rentoun, but only in so far as it was comprehended as a part of the barony of Coldinghame, which was appraised upon a bond granted by the apparent heir of Coldinghame,—to the effect, that, without entering heir, he might attain his predecessor's estate ; which apprising was deduced in the name of Sir Alexander, his nearest cousin to his own behoof, and he dying, the said Frank Stuart became nearest apparent heir ; and therefore Sir Alexander, according to his trust, did dispone the apprising to Frank. And as to the clause, “ for all other right,” it is no part of the dispositive clause, but only in the procuratory of resignation ; and must either be the error or fraud of the framer of the disposition, that the said clause was adjected, omitting the words that rationally should have followed, *viz.* “ by virtue of the said apprising,” which at length is narrated, and only disposed.

The Lords, before answer, having ordained Frank Stuart, the writer, and witnesses inserted to be examined, how this disposition was procured, Frank deponed, That it was delivered to him by John Bannatine, one of the witnesses in-