

It was ALLEGED, *1mo*, That he behoved to restrict his annualrent to 6 for the 100. This they were content to do. *2do*, The resignation whereon they were infest was null, because made in the Bailie of the Canongate's hands, whereas it should have been in the Earl of Roxburgh's, who was then superior. The Advocate repelled the allegiance, in respect it has ever been the custom that these resignations have been made in the Bailie's hands; in respect of which he sustained the resignation. *3tio*, ALLEGED, The decret of poinding must only be for the one half of the annualrent, because the pursuer, since his infestment of annualrent, has acquired the property of one of the two tenements which stood burdened and affected, so that *consolidatione et confusione tollitur obligatio*, and he is become both debtor and creditor as to the half, and he cannot have a servitude in that which is now become his own property, *cum res sua nemini serviat*.

To this it was ANSWERED, That the other tenement stood bound to him for his whole annualrent, since his right was an infestment of annualrent out of both of these tenements, or any part thereof, so that it was altogether in his option to take himself to the one or the other for his annualrent as he pleased, neither could he be restricted; and it is like to more *correi debendi* bound to a creditor conjunctly and severally, who may distress any of them he pleases.

REPLIED, Albeit he may distress any of them for his annualrent, yet if one of them pay the whole, it is out of all question but the heritor thereof will have relief against the heritor of the other tenement also bound *pro rata*; and so this pursuer will so be both debtor and creditor.

TRIPLIED, That is true where they belong not both to one man; but here there was one common author of both.

My Lord Advocate inclined to find annualrent extinct *pro dimidio*; yet was sparing, and took it to himself in avisandum. *Vide infra, No. 178. [June 22, 1671, Balmerinoch.]*

*Advocates' MS. No. 136, folio 90.*

1671. *February 21.* The EARL OF CALLANDER *against* PATRICK HADDEN.

Two comprisers, viz. Earl of Callander and Patrick Hadden, competing for the mails and duties of lands, it was objected by one of them against the other, that his comprising was null, in so far as it proceeded upon a gift of the ward of a marriage given, which marriage and ward could not fall, in respect the laird of Glennagies, by whose death the ward fell, was slain in the troubles at Dunbar in 1650; to whose heirs, by act of Parliament, their wards and marriages were gifted, viz. *Act 30, Parl. 1640*. To this it was ANSWERED, that *1mo*, That act was introduced only in favours of the heir and relict of the party slain; but so it was, the proposer of it here was neither heir nor party, and so he had not interest to propone it. *2do*, It was but a temporary act, to last during the time of the then troubles; but so it was, they were all after composed, and an act of oblivion and pacification past in 1641, and so it expired. *3tio*, It is expressly rescinded. REPLIED, any thing that is

is competent to a party is also competent to a creditor of that party ; and for its rescission there is a special salvo in the act rescissory 1661, that it shall noway prejudice private persons' rights; but *ita est* this is such. They were to have the Lords' answer.

The Lords found they would not extend the benefit of the act in 1640, to those slain in 1650, because that was not the war mentioned in the act.

*Vide infra, June 1677, No. 579, § 5. Brown and Arbuthnot.*

*Advocates' MS. No. 137, folio 90.*

1671. *February 22.* ALEXANDER BRAND *against* GEORGE GRAHAME.

The said George having the superior tenement to Alexander Brand's booth, he kept in the room just above his booth, his coals, his drink, his water, and all his other trash, by which coming through to his ware, it not only was considerably damnified thereby already, but might, in time coming, be much more if not prevented : whereon Alexander made his application to the Dean of Guild, who, after inspection and consideration taken of the prejudice done already, discharged the said George from using his said room to his neighbour's prejudice. This decret was suspended, and reduction raised of it upon this reason, that the Dean of Guild had committed manifest iniquity in restraining George Grahame in his own property, and hindering him from using his rooms at his pleasure ; especially considering that he and his predecessors have been in possession of using that room in the same manner these forty years. My Lord Advocate repelled the reason ; found the letters orderly proceeded ; and sustained the Dean of Guild's decret, as most just and rational to the rules of good neighbourhood. This action came near to that in the civil law *de damno infecto*.

*Advocates' MS. No. 138, folio 91.*

1671. *February 22.*

ANENT JURISDICTION.

It was questioned if a Sheriff, or other inferior Judge, in a process pursued before them, can grant a commission for examining witnesses which live without the jurisdiction of the Judge who is granter. Sir Jo. Cunninghame thought he could not grant a formal commission, since *par in parem non habet imperium*, and it is *extra territorium* ; yet he gives *litteras recommendaticias* by which they cannot be forced, but if *ex gratia* they depone, their depositions are as effectual to all points as if they had lived within his bounds ; and when there are any persons to be examined who reside in Holland, France, Poland, or other places over seas, the Lords do not so much grant a commission as only recommendatory letters, the words being *enixe rogamus*, and as ye may expect the same favour of us in like case.

*Vide J. Clarum lib. 5. senten. par finali Quaest. 26, who calls them litteras subdiales. Vide infra, Nov. 1671. Southesk, 507.*

*Advocates' MS. No. 139, folio 91.*