

It was ALLEGED, That the back-bond could furnish no such action ; bearing no such obligation, but only to make payment of the 900 merks, after payment of the whole 3000 merks.

The Lords, notwithstanding, did sustain the pursuit as to the bygone annual-rents, in so far only as the defender had intromitted with the rents of the tenements ; for which they ordained him to count and reckon : and did likewise discern him to denude himself of a proportional part of the right, in respect the back-bond did prove a clear trust as to that sum, and that Mr Thomas's name was only borrowed ; whereupon, *quocunque tempore*, he might be pursued to denude ; which being done, would liberate him from the obligation to make payment.

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1669. June 17. THOMAS, JANET, and MARGARET KERS, *against* AGNES KER.

THERE being a pursuit raised before the commissaries, at the instance of the said Thomas, Janet, and Margaret Kers, against the said Agnes, as executrix to Margaret Ker, for payment of certain legacies left to the pursuers ; whereof advocacy was raised upon iniquity, in so far, that the commissaries had repelled a relevant defence, *viz.* That the executor had pursued an exhibition, and recovered the writs for instructing the defunct's debts, and thereupon had pursued and recovered sentence against the debtors. Which defence was repelled, in respect of this reply, That execution had not been used upon the decreets timeously.

The Lords found, That the reply could not elide the defence ; in respect that the decreets were but recovered six or seven weeks before the pursuit before the commissaries ; which they found to be so short a time, that it could not make the executor liable for the whole debts and legacies ;—that she was only obliged to assign to the decreets ; unless the pursuer could allege that the debtors, during that short time, had put away their estates, or were in a worse condition.

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1669. June 17. STREIT, Englishman, *against* LADY TORPHICHEN.

STREIT, pursuing a poinding of the ground upon an infeftment granted by James Mason, the Lord Torphichen, who was superior of the lands, and had comprised the property, did compear and ALLEGE, That albeit it was [true] that, as superior, he nor his donatar could have no right to Mason's liferent, in respect he had received his son to be his vassal ; yet, seeing the son's right was reduced, he might join his right of superiority and comprising, and thereupon crave preference as to the liferent.

The Lords found, That these two titles, being *disparata* and of divers natures, and the liferent escheat not being sustained, it could not fortify the right of the comprising, which was after the pursuer's infeftment of annualrent.

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