

1685. *February.* LADY BARNCLEUGH *against* CREDITORS.

A RELICT having pursued an adjudication of her husband's lands, upon his obligation, in their contract of marriage, to relieve her jointure-lands of all incumbrances, that she might come in within year and day of his other creditors adjudgers;—it was Alleged for the other creditors, That she could not adjudge for relief, because there was no distress;—and *2d*, The quantity of the distress that could emerge was not liquid. Answered, The grounds of distress were obvious, *viz.* infettments prior to her right; and the grounds of the distress must be supposed as large as the ground of the infettments, and consequently liquid. The Lords, considering that the relict would be absolutely cut off, if she came not within year and day, and there being nothing said against the grounds of the distress condescended on, allowed her to adjudge for the whole, with this express provision, That her adjudication should only take effect in so far as distresses did emerge, and the legal should run from the time of actual distress.—*February 1685, Lady Barncleugh against Creditors.*

And, in November 1685, the Lords sustained an adjudication with the like provision, at a cautioner's instance, who was distressed by a charge of horning, but had made no payment. *Vide* No. 360, [Mary Bruce against Sir Patrick Hepburn, January 1684.]

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1685. *February 12.* HISLESIDE *against* LITTLEGIL, &c.

ONE Mitchel having received, upon his granting a back-bond, an assignation from Littlegil, to a bond of 4000 merks, due by Hamilton of Binnie as principal, and Hisleside as cautioner, and having pursued the cautioner, the defender proponed compensation and payment to the cedent in general; thereafter Littlegil assigned Mitchel's back-bond to Duke Hamilton and his creditors; and, before the term for proving the defence of payment and compensation, Hisleside, the defender, obtained a decret of *male appretiata* against Littlegil; at the advising whereof, it was alleged for the assignees to the back-bond, 1. That the process being now for their behoof, the decret against Littlegil could not meet them; seeing, when their assignation was intimated, the debt of *male appretiata* was not liquid by a sentence, and so cannot be a ground of compensing the debt due to them by the defender. 2. The defence of payment was but made in the general, without any special application to the debt of *male appretiata*. Answered for the defender, Littlegil, or Mitchel his trustee, could not prejudge the defender by any assignation, after the matter was litigious by litiscontestation upon the defence; and the term allowed against Mitchel to prove the defence of payment, consisting *in facto*, must be effectual against the assignees to his back-bond. 2. The exception of payment and compensation, in general terms, was sufficient, the pursuer not having craved the defender to be special as to the ground it was founded on: besides, the defender would lose his debt, if it was not sustained against the assignees, now that Littlegil is insolvent. The Lords sustained the answer, and found