

1663. *January 20.* PATRICK NICOLL *against* SIR ALEXANDER HOPE.

IN a molestation pursued by Patrick Nicoll against Sir Alexander Hope, wherein he craved that he might demolish a dike bigged by Sir Alexander upon his property; EXCEPTED, Grant it were bigged on your property, yet I offer me to prove, that by a condescendence betwixt your authors and me, it was agreed, the dike should be the march betwixt us, both having lands of Granton; by virtue whereof, that dike has stood as march betwixt [us] these 20 years past, till now.

ALLEGED, He behoved to condescend on the manner of probation of this agreement. He offered to prove it by witnesses; as being enough, after so long possession. URGED, Such a verbal condescendence betwixt the pursuer's author and this defender is not sufficient in law to take away any one's heritage, without writ; the pursuer standing infest in the lands of Granton, specially condescended on and bounded in his infestments. Then contended, a verbal condescendence on a dike to be the march betwixt the two Grantons, clad with 20 years possession but interruption, was probable *prout de jure*. The Lords found that condescendence not probable by witnesses, but only writ, unless it were alleged that the ground whereon the dike is bigged was contraverted before by the heritors of the two Grantons.

*Act.* Cunyghame. *Alt.* Harper.

*MS. folio 52.*

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1663. *January 24.* ——— *against* ———.

A SUM of money being resting by A to B, B assigns to C; and the creditor B being owing a like sum to D, the same is assigned by D to A. C the assignee, charging A to pay the sum assigned to him by B, A propones an exception of compensation of the like sum owing by B, his cedent, to D, and assigned by D to him, before the assignation made by B to the charger; which, being so prior to the pursuer's right, must compensate the assignee as well as the cedent.

ANSWERED,—*Non relevat* to say the assignation was prior, unless he also say the same was intimated to my cedent before my assignation. This the Lords found relevant, and repelled the exception of compensation foresaid. This interlocutor was stopped by a bill, on very good reason.

*Act.* Wallace. *Alt.* Lockhart.

*MS. folio 52.*

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1663. *January 25.* ——— *against* ———.

A WOMAN being convened to pay a debt, conform to a bond granted by her and her husband; EXCEPTED, The bond is null *quoad eam*, being then clad with a husband.

REPLY,—She had thereafter ratified the bond and debt judicially, *extra præsentiam mariti*, and so could not quarrel the same.

DUPLIED,—The ratification could operate nothing against her, being *super actu ex se illicito*, and intrinsically null; a woman clad with a husband not being a person who could contract debt. This was desired to be heard *in præsentia*.

*MS. folio 52.*

1663. *January 25.* THOMAS BEG *against* SIR THOMAS NICOLSONE.

THOMAS BEG, pursuing Sir Thomas Nicolson of Carnock to pay the sum of contained in his bond to Thomas Beg and Janet Levinston, in conjunct fee, and to the bairns to be gotten of the marriage, in fee; which failyieing, to Thomas and Margaret Begg, bairns of a former marriage; on which bond infeftment follows:

ALLEGED,—This sum cannot be paid to Thomas, because the fee of the sum failyieing of bairns of this marriage, did terminate in his other bairns *nominatim*, whereon infeftment followed; and there behoved to be a renunciation of the infeftment by Beg's bairns, before he could pay the sum *tuto*.

The Lords found the fee of the sum, failyieing of bairns of the marriage, belonged to the father; and that the bairns named in the bond could have no right to it, without they were served heirs of provision to their father; and found their father's discharge sufficient, without renunciation.

*Act. Chalmers. Alt. Norvell.*

*MS. folio 52.*

1663. *January 30.* The BURGH of LINLITHGOW *against* ANDREW BENNET.

THE burgh of Linlithgow, having found Andrew Bennet, inhabitant in Borrowstounesse, within their town, imprisons him, fines him, and takes a bond of him, not to traffic with staple goods; and thereafter charging him to pay the failyie contained in the bond; he suspends, that the bond was extorted from him, and so null, there being no law nor practick warranting burghs royal to take this way to vindicate their own privileges against burghs of barony. CONTENDED, Burgesses of burghs royal, as they had the privileges to arrest any man to find caution *judicio sisti*, &c. for debt owing to themselves, so they had the like privilege to attach men for their own liberties.

The Lords found the reason of suspension relevant, and assigned a day to prove; and so found the way Lithgow had taken not warranted by any Act of Parliament.

*Act. Nisbet.*

*MS. folio 52.*