

1583. *February.*

One may pass from an exception or reply admitted to his probation, if there be no term assigned for proving thereof; because found that there is no litiscontestation, unless a term be assigned. *Communis tamen est Doctorum opinio, quod exceptione peremptoria proposita, quæ tollit libellum et condemnationem litis, semper sit litiscontestatio.*

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1583. *February.* KER of MERSINGTON *against* KER of SHAW.

KER of Mersington having obtained a decret of non-entry of the lands of Dalcosie, with the tower and fortalice thereof, pursued Ker of Shaw for delivery of the house to him upon six days' warning. Excepted, That the pursuer had no action for delivery of the house by that order; but it behoved him to make warning, or apprise the lands, and obtain sasine first, and then seek the delivery of the house. Replied, That he, being donatar to the gift of non-entry, and having obtained decret thereupon, had as good right to pursue by virtue thereof, as if he had obtained the gift of a ward. The order was found good, and that the house should be delivered without any warning, by the chancellor's vote.

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1583. *June.* EUPHAME MACKALZEAN and PATRICK MOSCROFT *against* WILLIAM NAPIER of WRIGHTS-HOUSES.

EUPHAME Mackalzean, as nearest and lawful heir to Mr Thomas her father, and Patrick Moscroft, her husband, for his interest, pursued William Napier of Wrights-houses for the bygone annual-rents of 1000 merks laid upon his land by her father, whereof he received infestment and sasine, to be holden blench of William, as superior. Alleged, She could not have the annual-rents for the space of three years, during which the said infestment of annual-rent was in non-entry, and so belonged to the defender, as superior. Replied, He could not retain those three years' annual-rents in his own hands by reason of non-entry; because he was bound to warrant the pursuer's infestment of annual-rent from all wards, non-entries, &c.—*et sic quem de evictione, &c.* Duplied, In so far as he was bound to warrant it from non-entries, that behoved to be understood of such as came by him, or by his deed and occasion; but this non-entry came by the pursuer's self, *et ob negligentiam hæredis, jus suum minime prosequentis*; for she might have sought the superior to have entered her, and used the ordinary remedy for the same. Triplied, That, albeit the fault proceeded not from him, yet there was no reason that he, having received another's silver, should retain the profit thereof in his own hands, *et sic locupletaretur cum alterius jactura*; for it was not alike in infestments and alienations of annual-rents received by a

vassal *titulo oneroso*, as in other heritable infeftments and dispositions made by superiors to vassals *titulo lucrativo*, or at least for service without any sums of money debursed; and also, it was notour that the pursuer was hindered to enter heir to her father *legitimo impedimento, quia objecta fuit illi quaestio natalium*, by Mr Henry Mackalzean, before the commissaries, and she summoned to hear herself declared bastard; in respect whereof her lying out could not prejudge her; but now, after she is declared heir, *debet recuperare fructus hereditatis jacentis*. The Lords found, that, during the time of the non-entry, the annual-rents belonged to the superior.

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1583. November.

ONE being pursued to flit and remove from a mill and dean lands: Alleged, That she was heritably infeft in the same by the pursuer's predecessor. Replied, That, since that infeftment and sasine following thereupon, she had taken tack and assedation of the same; and so, having acknowledged herself once to be tackswoman, she behoved to remove after the ish of the said tack. Duplied, That her heritable right and infeftment could not be prejudged by the tack, and that, in a removing, the exception of an heritable right and sasine before the warning, will ever stop the removing. Triplied, That, by the common law, *Si quis, conductionis titulo agrum vel aliam quamcunque rem accepit, possessionem prius restituere debet, et tum de proprietate litigare. C. Locati*. The Lords decerned her to flit and remove, without prejudice to her heritable right *in judicio petitorio*.

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1583. November. SCOTT of SPENCERFEILD *against* The LAIRD of BARNBOUGALL.

AN advocacy being craved by Scott of Spencerfeild against the Laird of Barnbougall, his superior, who had summoned him before his own bailie, to hear and see his land decerned in non-entry, some of the Lords were of opinion that it agreed with the law and daily practick, that the superior might be judge, and had ordinary jurisdiction between him and his vassal, (except the question resulted upon heritable right;) for, *sicuti habebat jurisdictionem voluntariam* in the receiving and entering of his vassal, *ita habebat jurisdictionem contentiosam*, if the vassal paid not his duties and homages. Others thought it no ways reasonable that he should be judge *ubi ageretur de suo commodo*; and so the bill was granted.

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