

1624. *November 26.* JOHNSTON *against* RORESON.

IN an action betwixt Johnston and Roreson, for payment of a yearly duty, conform to the defender's promise made to the pursuer,—the Lords found the promise null and ineffectual to produce any action against the maker, because it was a promise made by the defender to an interposed person, to the behoof and in favours of the wife during the time of their marriage; and so was not obligatory:—albeit it was replied that the promise ought to be maintained, seeing, howsoever it was made, *stante matrimonio*, by the husband, to the behoof of the wife, yet, since the making thereof, divorcement had followed; since which divorcement, and also before the divorcement, the promise had taken effect by payment-making of the yearly duty promised, divers years both before and since they were divorced. Notwithstanding whereof the promise was found not obligatory.

*Act.* M'Gill. *Alt.* Cunninghame. Gibson, *Clerk.* *Vid.* 9th January 1623, Marshall; 11th January 1625, Hamilton's Inhibition; 21st December 1626, La. Foulis.

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1624. *November 26.* JOB *against* KER.

IN an action of spuilie, pursued by Job *against* Ker, an exception of poinding being proponed to elide the spuilie for a term's duty addebted to the excipient by the pursuer, which he was obliged to take to pay to him; and it being replied that the poinding for that term could not elide the spuilie, seeing the defender placed in other tenants in the land that year, for the which the poinding is used, which tenants so placed, and in-put by himself, laboured the ground that year, and the pursuer left the same, and removed therefrom before, so that he could not be debtor in that year's duty;—this reply was only found relevant to be proven by writ, or oath of party, seeing it tended to prove payment of a duty contained in a written tack, and so to make the tack and poinding thereupon ineffectual;—and would not admit the same to be proven *per testes omni exceptione majores*, as the pursuer offered.

*Hay, Clerk.* *Vid.* 25th November 1624, Bisset *against* Bisset; and 26th February 1631, L. Garthland; where none may poind their own ground.

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1624. *November 27.* MAXWELL of PORTRAK *against* ———

IN an action of removing, pursued by Maxwell of Portrak *against* ———; the Lords found, that a sasine of the lands libelled, (being of old kirk-lands of the abbacy of Melross, now erected in a temporal lordship,) which sasine, given to the pursuer, proceeded upon the Earl of Melross, who was lord of the erection, his precept of *clare constat*,—was a sufficient title to produce this action to

the pursuer, notwithstanding that it was alleged that the same was null, being of kirk-lands, not confirmed; which allegiance was repelled; and found, that there was no necessity to reply upon confirmation, seeing, if there was no confirmation, then the right of the lands pertained to the lord of erection, who, by the said precept of *clare constat*, was denuded; and he opposed not that nullity, and so the right was sustained, without necessity of confirmation, specially against the excipient, who alleged no right in his person of the lands libelled; and which, the excipient contended, he had no necessity to allege, seeing it was sufficient to him to exclude the pursuer's title, upon a nullity statuted by law, and which was not elided by the precept of *clare constat* granted by the lord of erection, who has not given to the pursuer his right to the lands, by an original security flowing immediately from him, but only has received the pursuer, by a precept of *clare constat*, as heir to his forebears, which of necessity requires that his forebears should have had a lawful right; and so the defender alleged he might oppose against the lawfulness of that right, in respect of the said defect. Which allegiance was repelled.

*Act. Cunninghame. Alt. ———. Scot, Clerk.*

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1624. *November 27.* A BAXTER in Leith *against* HENRY MACKESON.

IN an action, pursued by a baxter of Leith against Henry Mackeson, for payment of the price of bread furnished to his house, by the space of one year, and received by the defender's daughter, from the pursuer, extending to an hundred pounds;—the Lords found that this action, and the like, ought not to be sustained, in respect of the danger which might ensue thereupon, *viz.* that masters might be convened, if this were sustained, for many years' furnishing, either taken on by their servants or bairns, without any warrant or direction, or when the master might have given to his servants, or others who had the charge of provision of his house, full satisfaction to do the same; which payment, if the said servants should bestow otherwise than for satisfying of these who had made the furnishing, it were against reason that the master should be convened therefor, except that the master himself had directed the furnishers to furnish his house, and to answer his servants; in which case, if he so commanded, then he ought also to have seen the furnishers paid. But there being no direction given by the master, to these who made any furnishing, the Lords would not sustain any such pursuit moved against them; albeit it was alleged, in this action, that the daughter, who had received the bread furnished, was in use, divers years before, to receive and take, for the defender's house, the whole furnishing and provision thereto, both in bread from the pursuers, and other necessaries thereto, from divers other persons; likeas he replied, that he offered herewith also to prove, that the whole bread libelled was really received within the defender's house, and applied to his own use. Which was not respected, nor the action sustained.

*Act. Craig. Alt. Hope. Gibson, Clerk. Vid. 21st June 1634, Sir James Hamilton.*

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