

1670. *January 6.*HOG *against* JAMES KIRK.

IN a suspension at Hog's instance, against James Kirk, of a decret recovered at Forbes's instance, his author, of a decret before the commissaries, for payment of the price of certain plenishing, upon this reason :—That the decret was null, as wanting probation, in so far as many of the particulars were proven *per testes singulares*: It was ANSWERED, That the pursuer's oath was taken in supplement; which was sufficient in this case, where Hog had entered to the possession *culpa et dolo*, without any warrant. It being REPLIED, That the charger had left his house when the English forces came in; and the suspender, being landlord, was necessitated to enter to the possession of his house, for preservation thereof, and of the charger's plenishing.

The Lords found, That his intromission with the plenishing could not be proven *per testes singulares* and the pursuer's oath of supplement; but by the suspender's oath, if there were not two witnesses to prove the same. Thereafter this interlocutor being reconsidered upon a bill, the Lords did sustain the probation *per testes singulares* and the oath of supplement; unless the suspender will prove, that before his entry to the house, the English soldiers, who were there quartered, and the charger's own servants, did carry away some of the plenishing; which being proven, they declared they would adhere to the first interlocutor.

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1670. *January 11.* EARL of SOUTHESK *against* PHILIPHAUGH.

PHILIPHAUGH's father having a wadset of the lands of Dryhope, whereof the Earl of Traquair had the reversion, and did redeem the said lands, by payment of 8000 merks to Philiphaugh's factor and curator; which was acknowledged by a fitted account with Philiphaugh's tutors and his goodsire, who did grant a renunciation thereof; as likewise by a discharge, to the factor, of all his intromissions, and particularly of the sum of that wadset, which thereafter he did ratify when he was major. Notwithstanding whereof, that wadset being comprised from Philiphaugh, and the compriser pursuing for the mails and duties; the Earl of Southesk, as having right to these lands from Traquair, did intent action against Philiphaugh for warranting the wadset lands against the comprising, by refunding and paying back the monies paid to his factor for redemption thereof.

It was ALLEGED for the defender, That the fitted accounts and discharge granted by him in his minority, and the renunciation granted by his goodsire, who was not his tutor, could not prejudice him; and as to the ratification when he was major, it was done before he understood his affairs: neither did ever the factor instruct, nor can it yet be instructed, that the sum of the wadset was profitably employed for his use, for payment of his debts.

The Lords having examined the factor, Mr John Lawson, upon his oath, and his count books, whereby it was cleared, that the money was employed for