

1670. June 24. WAIT *against* CAMPBELL of KILPOINT.

IN a pursuit at Wait's instance, against the said Mr Archibald, as representing his father, who was cautioner for the Laird of Lawers for £1000, upon this passive title;—That, after the contracting of the debt, his father, by contract of marriage with Thomas Moodie's daughter, did become obliged to pay to the said Thomas, for his son's behoof, the sum of £40,000, for which the said Thomas was obliged to pay £20,000 in name of tocher; of both which sums the father and the son did grant receipt and discharge to the said Thomas Moodie, but did not bear which of them received the money:

The Lords did not sustain that he was successor *titulo lucrativo*, as for the 20,000 merks paid in tocher; neither that that sum was liable to the father's creditors: But as to the £40,000, they found him liable; and that it might be affected by his father's prior creditors.

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1670. June 24. MR WILLIAM ROBERTSON *against* CAMPBELL of KILPOINT.

THE said Mr Archibald Campbell being pursued at Robertson's instance, as cautioner, in a contract of wadset, for the Master of Gray, for 50,000 merks, in case of requisition; in which wadset there was a clause,—that if he should continue in possession of the lands, that the principal and cautioner should be free of annualrent: the said Mr William having desisted to possess, and suffered the Laird of Philorth to enter into the possession, who had required a right of reversion, did pursue for the principal sum due by the requisition, and for five years' annualrent, that he had been out of the possession:

It was ALLEGED, That the pursuer having continued in possession after the requisition, and thereafter having desisted, without any decreet gotten against him at Philorth's instance, he could not pursue for payment.

It was REPLIED, That, by the foresaid clause of wadset, it was in the pursuer's option to possess or not possess, as he pleased; so that he might desist, and seek the annualrent of his money.

The Lords did sustain the pursuit for the principal sum and annualrent in time coming; the pursuer denuding himself of the right of wadset, in favour of the defender, who was only cautioner. But as to the years that he had suffered Philorth to possess, the defender was assoilyied; seeing he had never used an order of redemption, but had possessed, by the pursuer's tolerance or right.

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1670. June 28. THE LAIRD of NIDRIE and MR CHARLES LUMISDEN *against* MURRAY.

THERE being a decreet of removing obtained against Murray, he gave in a

bill of suspension upon this reason,—that he had a tack of tolerance from Mr Thomas Baird, who was curator, *sine quo non* to George Chalmers, who bruiked the said tenement, *pro indiviso*, with Mr Charles Lumisden.

The Lords refused to pass the bill upon that reason; in respect the pupil himself being *majoritati proximus*, and having the consent of another curator, who did join with Lumisden, who did bruik with the minor, *pro indiviso*, and did set the same; especially the prior tenant being run in arrears, and Nidrie, a man most responsible, who was to enter.

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1670. June 28. ——— against ———.

ARCHIBALD Law, having given in a bill, that the Lords would give warrant to the writers of the signet to write out letters of apprising of the teinds and patronage of Innerwick, upon a bond granted by the Earl of Salisbury for a sum of money, *ad hunc effectum* only, that comprising might be led, bearing his consent; which warrant was craved by the writers for this reason,—That, by an old Act of Parliament, and constant custom and practice, no comprising could be led till after searching of the ground and pointing of moveables, if any were; and that, by an Act of the last session of this Parliament, there could be no pointing of moveables but after a previous charge of horning.

The Lords, notwithstanding, did grant warrant for comprising, in respect of the consent of the party and the conception of the bond; which was only granted for that effect: and found, That letters of horning and pointing were only necessary where bonds were granted, or decreets gotten, for payment of liquid debts at a certain day.

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1670. June 29. The MINISTER of AUCHTERHOUSE against MR ROBERT HAY of DRONLAW.

THE minister, being presented to the kirk of Auchterhouse, and unto the whole parsonage teinds thereof, by the Bishop of Dunkeld, as being, at his presentation, *jure devoluto*, the Earl of Buchan, who was patron, neglecting to present, did pursue Dronlaw for the teinds of his lands for several years since the presentation.

It was ALLEGED for the defender, Absolvitor; because the Earls of Buchan, having always agreed with the former ministers, and been in use to pay a modified and local stipend, this minister could crave no more than his predecessors.

The Lords did sustain the defence as to all bygones which were *bona fide* paid by the defender to the Earl of Buchan; reserving action as accords for the future.

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