1677. *June* 13. BORTHWICK of PILMOOR *against* The LAIRD of KIRKLAND.

THE lands of Pilmoor and Kirkland, being both parts of the muir of Haddingtoun, came thereafter to belong to divers heritors: those of Pilmoor were infeft expressly *cum puteo*: and there are two wells in Pilmoor; the one, called the Lady-Well, had a constant rivulet, which, above fifty years, is proven to have run to the house of Kirkland, and hath had, of long time, a timber spout lying upon the lands of Pilmoor, near the marches of Kirkland; whereby the water is hindered from the descent, and made to run level with a brae, by which it runs to the house of Kirkland; and, following the natural course and situation, it would not run that way. There are mutual declarators betwixt Pilmoor and Kirkland; the former being *actio negatoria* for declaring his lands free of the rivulets running that way; the other *confessoria*, for declaring that the water ought to continue to run that way to Kirkland. Whereupon witnesses were examined *hinc inde*, both as to the possession and interruption; and there is produced a submission betwixt the heritors of Pilmoor and Kirkland, *in anno* 1622, concerning the course of this water. And the witnesses for Kirkland being interrogated, Whether the water had run to the house of Kirkland past memory, or, at least above forty years: one of them depones, That it ran so sixty years; and two others, that it ran so above fifty years. Interruptions are also proven frequently these forty years past, by taking up and breaking the spout, whereby the water run by its natural course some days; and two instruments of civil interruption produced.

At advising, it was ALLEGED for Kirkland, 1*mo*. That so old a possession of this course of the water being proven by writ and many witnesses, the same ought so to continue, having so run when both these lands belonged to one heritor, without the constitution of any servitude *de jure communi*. 2*do*. A servitude is here constituted by use and prescription, which is proven to have been immemorial; which must infer that it was so for hundreds of years past: and, therefore, no interruption within these forty years can be effectual, seeing immemorial possession imports forty years' possession before the first interruption; unless immemorial interruptions were also proven. And though the submission and witnesses prove but fifty-five years' possession, that imports immemorial possession: it being a negative, and cannot possibly be proven further, than that ancient witnesses depone of their knowledge of possession for fifty or sixty years; and no other witnesses depone when the said possession began.

It was ANSWERED, That, albeit *in possessorio*, the course of a constant stream of water may not be altered *ad libitum*, but suffered to run as it ran the former summer; and that for public utility's sake: as, if a mill or other public work be built thereupon, by the knowledge and tolerance of the heritors through whose lands it runs, the same cannot be altered, to the prejudice of the said public work. But otherwise, an heritor suffering a rivulet, running from his own proper well, to run such a course 100 years, cannot hinder him to stop it, or turn it to his use any other way. And, as to the servitude, it is not here constituted, seeing there are frequent interruptions proven. And the submission, which is the eldest probation, as it may infer possession, so it doth infer interruption; for, as *provocatio ad judicem* is a civil interruption, albeit the judge were not competent, because it takes off *patientiam Domini*, and his acquiescence and re-

linquishing his right; so, much more doth any act, by way of fact, or by way of instrument, for express impediment of that servitude. And, as ancient possession may presume anterior possession, so must ancient interruptions import prior interruptions. Neither is the immemorial possession proven; for it is necessary, for immemorial possession, either to prove that it was holden and reputed to be immemorial, or to prove the possession so ancient, as, by the course of nature, witnesses cannot be had who can know a more ancient, and so cannot know the beginning of the possession: but fifty or sixty years' possession may admit of witnesses who may know for twenty years before; and so might know the beginning of the possession.

The Lords found, That the parties had not adverted to the importance of immemorial possession; which would not be elided by interruptions within forty years: And, therefore, they ordained one of their number to visit the ground, and to examine the most ancient witnesses adduced for either party, for clearing whether the beginning of this water course towards the house of Kirkland could be proven; that thereby it might appear whether it be immemorial or not, or whether forty years before the first interruption or not.

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1677. *June* 19. DICKSON *against* EDGAR.

IN a pursuit at the instance of Mr George Dickson against Edgar of Wedderly, wherein Mr George insisted, as heir to his brother, Mr Robert, for transferring of a decreet, at his brother's instance, against Edgar of Wedderly, which was pronounced, but not extracted, in his brother's time; the defender ALLEGED Compensation; because the pursuer's right was as heir to his brother, who was assignee by Nethermains, by whom his name was filled up in blank assignations and translations, which were Nethermains's rights, in his own hand; and, therefore, were compensible by Nethermains's debt: and, therefore, Wedderly, as executor-creditor to old Wedderly, his mother's father, having confirmed a debt due by Nethermains's father to old Wedderly, had good interest to compense a debt due by old Wedderly to Nethermains, against Nethermains's assignee; it being an uncontroverted rule, that compensation is relevant against the assignee, upon the cedent's debt prior to the intimation.

It was ANSWERED, 1*mo*. That the pursuer's brother did obtain decreet, against this Wedderly, before the Sheriff of Berwick; and therefore, by the Act of Parliament anent compensation, it was not receivable *post sententiam;* and the Lords had lately decided that they would not receive compensation after sentence, though in absence, and of an inferior court. *2do*. Compensation must be liquid *inter easdem partes:* but here, the time of the pursuer's brother's completing his right by assignation, both by apprising, that needs no intimation, and by intimation by citation; the defender had then no right to the sums wherewith he would compense, but was only executor-creditor; which is but like to an assignation; which will not found a compensation against an assignee, unless it had been intimated before the intimation of that assignee's assignation.

It was REPLIED, That the defender was not executor-creditor as a mere stranger, but was one of the nearest of kin to the defunct; which gave him sufficient