

1684. *January 19.* The EARL of SOUTHESK *against* ROGER SOFTLY, &c.

THE Earl of Southesk's action against Roger Softly of Holmes, and others, or multures, was this day advised; and the Lords restricted the process to the years since the pursuer's infestment produced, *viz.* 1659, reserving to the pursuer to insist in another process for the years preceding the same; and sustain process for all years since the citation, and for five years preceding it, because of the quinquennial prescription of multures introduced by the Act of Parliament 1669; which allegiance of prescription for any years after the said Act of Parl. they sustain; and find the astriction and quantities proven against the said Roger by the decret produced, and decern against him for the space of 12 years, during which space he acknowledges he has possessed. And also find the astriction and quantity proven by the decret produced, against Maxwell of Cowheath, Brown of Nunland, and Maxwell of Hills; and assign the day of next, to their procurators to produce them, to depone anent the time of their possession; the said Maxwell of Hills his oath being only resiled from as to the having of writs, but not as to any other point in the process.

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1684. *January 19.* BRODIE of MILTON *against* ROBERT SCOT.

IN a case between Brodie of Milton, and Mr Robert Scott, minister at the Abbey of Holyroodhouse; it was reasoned among the Lords, whether the raiser of an improbation, standing infest in lands, could call for any bonds, or wadsets, &c. granted by any person whom he no ways represented, nor could succeed to *jure sanguinis*. The solider part of the Lords argued, that he could not; else a compriser might insert a third party's lands in his comprising, and, without instructing his debtor's right to them, force him to produce his whole charter-chest and writs; which was absurd. Others said, the design of impropriations was to secure heritors in their rights of lands, and to remove all impediments that stood in his way; and what way could a man secure himself against such rights otherways?

It is ANSWERED,—Proprietors had interest and power to put all lets out of their way, but they must do it *habili modo*; for they had not interest to improve such rights, but all they could do was, in a reduction and declarator, to annul them as flowing *a non habente potestatem*; and principles of form and material justice should not be thus questioned nor loosed.

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1684. *January 24.* WALTER BURNSYDE *against* WILLIAM BROWN.

MR Walter Burnsyde's action against William Brown, late agent to the Burrows, being reported; the Lords ordained William, either to produce the comprising, and the grounds whereon it proceeded, or else to consign, in the

clerk's hands, the money for which the comprising was led. In which case, they would admit Captain Hume of Foord's interest, to prove the comprising was extinguished, or satisfied in whole or in part. *Vol. I. Page 263.*

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1679, 1680, and 1684. JOHN HOPE OF HOPETON *against* GEORGE YOUNG and THE EARL OF WINTON.

See the prior part of this case, Dictionary, page 15,718.

1679. *February 26.*—JOHN Hope of Hopeton pursues a declarator of fraud and circumvention against the Earl of Winton and George Young, for reducing the said George his rental and prorogation of some lands in Winchburgh. (*Vide* 17th July 1678.) ALLEGED,—You Hopeton can never quarrel this, because you have taken the disposition with the burden of this right of George Young's, and have expressly excepted it, that it shall not be leisome for you to quarrel it upon any ground, but only not payment of the tack-duty.

REPLIED,—The reason of that was, because the Earl alleged he would be liable in warrandice to George if it were not excepted. Now this was a circumvention; for the rental was to my Lord's own behoof.

This being reported, the Lords repelled the reason of reduction, in respect of the clause *in græmio* of Hopeton's own disposition.

Then Hopeton gave in a bill, craving my Lord's oath, and of the comuners at the bargain, on this,—if he did allow Hopeton to quarrel that rental, providing the warrandice should not recur against him; and that it was not a true date, and was not then delivered.

The Lords ordained the Earl to depone thereon, in presence of the comuners if they pleased; which he did before Sir John Dalrymple, Sir Walter Seton, Mr Archibald Hope, and Doctor Livingston, and denied it: which being advised, the Lords assoilyied from the reduction.

Some Lords were of opinion, that, being a circumstantial circumvention, it was both just and necessary the Lords should have examined the comuners; but the Lords dispensed with this, (which in other cases they would have done,) from their deference to my Lord Winton. *Vol. I. Page 45.*

1680. *February 24.*—In Hopeton's suspension against the Earl of Winton, (26th Feb. 1679;) the Lords found, that Hopeton having bought Winchburgh, &c., by a rental, and at the tail of it having declared himself satisfied therewith, he could not now retain of the price either upon the account that he offered to prove that some acres were twice charged, or that there were some called 14 acres, which after measure would not be 10, seeing in these cases *caveat emptor*, and he may gain as much upon the measure of other acres. And they would not burden the Earl to prove they were commonly holden and reputed so many acres. *Vol. I. Page 87.*

1684. *January 24.*—The Laird of Hopeton's case against George Young in Winchburgh, being reported by Kemnay, the Lords adhered to their former interlocutor, dated the 17th July 1678, finding the duty contained in the rental