

1703. January 7.

STEWART and GRANT *against* BARCLAY, *alias* GORDON.

PATRICK BARCLAY, *alias* Gordon of Towie, is pursued by Stewart and Grant, for payment of a debt due by Rothemay, his father, to them; and for the *medium probandi* of the passive title against him, they produced his infestment on a disposition from his father, burdened with all his debts contracted, or to be contracted.—*Alleged*, The clause allowed his father only to contract debts *pro expediendo licitas suas res et necessaria negotia*, and therefore it was not enough that they had lent him money, and got his bond for the same, unless they likewise prove that he borrowed and expended it on his necessary affairs; and the clause not only requires it to be a lawful debt, but likewise necessary, else these words would be superfluous, and signify nothing of *necessaria negotia*; and wherever a party is bound up from contracting debt, except on necessary occasions, the creditor must prove *in rem versum*, as in the case of minors, institors, interdicted persons, &c.—*Answered*, It is not so much as denied, but this is a just and true debt of Rothemay's, and that the money was actually downtold and delivered to him, and the creditor was not concerned to what use he applied the same; neither does the clause oblige the lender of the money to any such thing.—THE LORDS repelled the defence, in respect of the answer.

*Fol. Dic. v. 1. p. 147. Fountainball, v. 2. p. 173.*

1739. January 23. EARL OF WIGTON *against* FEUARS.

THE commonty of Biggar, lying within the barony of Biggar, did once belong in property to the family of Wigton; and in all probability had been possessed in common by the tenants of the family surrounding the same: The possessions lying about the common were feued out at several times; and the vassals continued their possession of the common in the same way that the tenants of the family had done before. The Earl of Wigton insisting in a division of the common, claimed the *præcipuum* as proprietor.—The defenders *insisted*, That they were conjunct proprietors; and the LORDS found, That a disposition with *parts and pertinents*, joined with an uninterrupted possession of the muir, as extensive in all respects as the pursuer's possession thereof, doth constitute a right of property; but where a disposition was in these terms, *with liberty and privilege of the commonty of Biggar*, they found it only to import a right of servitude.—They further found, that this clause, *with parts and pertinents, and common pasturage used and wont*, doth only import a right of servitude, unless the feuar condescend upon some special right of common pasturage belonging to his lands, other than that upon the said commonty; to which the general words of *common pasturage* may apply. See SERVITUDE.

*Fol. Dic. v. 1. p. 147.*

No 39.

A disponent reserved power to contract debts, *pro expediendo licitas suas res et necessaria negotia*. A person who had lent him money, was not obliged, in a question with the disponent, to show that the money had been *in rem versum* of the disponent.

No 40.

A disposition, *with parts and pertinents*, joined with uninterrupted possession, found to confer property, not servitude, in a common. The words, *with liberty and privilege of the commonty*, found to import only servitude. The words, *with parts and pertinents, and common pasturage, used and wont*, found to import only servitude.