

for the which he had found the foresaid caution ; for, the cautioner being only generally bound that the factor should discharge an honest and faithful duty, could not be specially pursued till sentence were recovered against the factor, constituting him special debtor to the pursuer. Which was so found by the Lords ; albeit the pursuer replied, that he had in effect discussed the said factor, in respect he produced two of his own missive letters, written to the pursuer, wherein he confessed that he had received so many wares from him as extended to the prices now claimed by the pursuer ; likeas he confessed, in the same letters, that he was not then able to give him satisfaction. Which reply was not sustained.

*Act.* Burnet, *major.* *Alt.* ————. *Scot, Clerk.* *Vid.* 10th December 1623, what is noted there.

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1626. *July 12.* The EARL of DUMFERMLING *against* LADY DUMFERMLING.

IN an action of extension of a minute betwixt the Earl of Dumfermling and his mother, pursued at the instance of the Earl, and the Earl of Wintoun his tutor, against the lady,—the Lords found, that neither this minute could be extended nor should produce any other action thereupon, because the same was only set down by way of advice and counsel, and contained only the opinion of certain friends, whose opinions were sought by the said parties in certain particular questions anent matters controverted betwixt the said parties ; which resolution and advice, so set down in the foresaid minute, was found not to be obligatory to bind the parties to their advice, and to the abiding and standing at the same ; and so that it could not produce action against the party who should oppone against the same : And this was found, albeit the inscription bore these words, *viz. Questions to be resolved by the three friends therein named, viz. the Chancellor, the Earls of Melrose and Lauderdale, with the which both the said parties were content ;* likeas the said minute, containing the said questions, was at the end thereof subscribed by both the said parties :—in respect of the which inscription, bearing, as said is, *That the parties were content,* and, in respect of their subscription of the minute, the pursuer replied, that the defender could not be heard to allege that the minute was not obligatory, and that it was but a naked advice, which could not bind by the law. Which reply was not respected, and the minute found not to be obligatory, because it was set down by way of advice, as said is.

*Act.* Hope and Nicolson. *Alt.* Stuart and Aiton. *Gibson, Clerk.*

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1626. *July 14.* The LAIRD of GRANGE *against* BETSON of CARDEN.

IN a contravention, pursued by the Laird of Grange *against* Betson of Carden,—the Lords were of the mind, albeit this was not then in specific terms found, (because that point was not controverted,) that neither pasturage *in confinio,*

amongst neighbours marching together, nor yet herding of goods upon the neighbours' lands, were sufficient deeds whereupon contravention ought to be granted; except therewith some further deed should concur, such as if he who pastured, being prohibited by the other neighbour, and discharged to do the same, he would not obey, but that he persisted, notwithstanding thereof, or masterfully persisted or used some violence, or did some other unlawful deed beside the naked pasturing; for, *in confinio*, the suffering of goods to stay and pasture upon the neighbours' ground, which may fall out by the oversight of herds and servants, without allowance of the master, is over-bare a cause of contravention. But this was not decided, and, before the decision, the Lords gave commission to two of their number to see the ground, and to examine witnesses for both parties; for both the parties claimed the land, as pertinents of their heritage, and alleged possession thereof, as parts and pertinents of their lands.

*Act.* Stuart. *Alt.* Lermonth. Gibson, *Clerk.*

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1626. *July 15.* M'PHADRICK *against* M'LACHLAN.

IN an action, at the instance of a poor woman called M'Phadrick *against* MacLachlan, for intrusion,—the Lords found, that, albeit the action was prescribed, not being pursued within the space of three years after the committing thereof, yet that the same ought to be sustained for the ordinary duties of the land, which they were in use to pay before the time of the intrusion; albeit the defender alleged that the action for profits ought not to be sustained in any sort. Which was repelled.

*Act.* Burnet. *Alt.* Mowat. Scot, *Clerk.* *Vid.* 16th March 1627, Walter Hay; 25th February 1624, Denmuire.

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1626. *July 19.* The EARL MARISHAL *against* The RELICT and BAIRNS of the MINISTER of PETERHEAD.

IN a double pointing, at the instance of the Earl Marishal, who was charged by the Relict and Bairns of the deceased minister at Peterhead, who was incumbent and served the cure, and who died before the feast of Michaelmas, *anno* 1623, and who was, on the other part, charged by the new entrant minister, for the stipend of the year 1624; to the which stipend, for the whole year, the said entrant minister craved the only right, and alleged that he ought to be answered thereof for both the terms of Whitsunday and Martinmas that year, in respect he served the cure that whole year; and the relict and bairns of the deceased minister claiming right to the half of that year's stipend, by reason of an act and statute of the kirk, introduced in favours of the relicts and bairns of deceased prelates and ministers, which appoints the duties of the half of the profits of the prelate, and sicklike of the stipend for the year subsequent, next after