

1670. *January 6.*HOG *against* JAMES KIRK.

IN a suspension at Hog's instance, against James Kirk, of a decret recovered at Forbes's instance, his author, of a decret before the commissaries, for payment of the price of certain plenishing, upon this reason :—That the decret was null, as wanting probation, in so far as many of the particulars were proven *per testes singulares*: It was ANSWERED, That the pursuer's oath was taken in supplement; which was sufficient in this case, where Hog had entered to the possession *culpa et dolo*, without any warrant. It being REPLIED, That the charger had left his house when the English forces came in; and the suspender, being landlord, was necessitated to enter to the possession of his house, for preservation thereof, and of the charger's plenishing.

The Lords found, That his intromission with the plenishing could not be proven *per testes singulares* and the pursuer's oath of supplement; but by the suspender's oath, if there were not two witnesses to prove the same. Thereafter this interlocutor being reconsidered upon a bill, the Lords did sustain the probation *per testes singulares* and the oath of supplement; unless the suspender will prove, that before his entry to the house, the English soldiers, who were there quartered, and the charger's own servants, did carry away some of the plenishing; which being proven, they declared they would adhere to the first interlocutor.

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1670. *January 11.* EARL of SOUTHESK *against* PHILIPHAUGH.

PHILIPHAUGH's father having a wadset of the lands of Dryhope, whereof the Earl of Traquair had the reversion, and did redeem the said lands, by payment of 8000 merks to Philiphaugh's factor and curator; which was acknowledged by a fitted account with Philiphaugh's tutors and his goodsire, who did grant a renunciation thereof; as likewise by a discharge, to the factor, of all his intromissions, and particularly of the sum of that wadset, which thereafter he did ratify when he was major. Notwithstanding whereof, that wadset being comprised from Philiphaugh, and the compriser pursuing for the mails and duties; the Earl of Southesk, as having right to these lands from Traquair, did intent action against Philiphaugh for warranting the wadset lands against the comprising, by refunding and paying back the monies paid to his factor for redemption thereof.

It was ALLEGED for the defender, That the fitted accounts and discharge granted by him in his minority, and the renunciation granted by his goodsire, who was not his tutor, could not prejudice him; and as to the ratification when he was major, it was done before he understood his affairs: neither did ever the factor instruct, nor can it yet be instructed, that the sum of the wadset was profitably employed for his use, for payment of his debts.

The Lords having examined the factor, Mr John Lawson, upon his oath, and his count books, whereby it was cleared, that the money was employed for

payment of Philiphaugh's creditors ; and that his goodsire, and the Lord Dury, and other friends, who were most intelligent men, had subscribed the account ; they found, after so long time, the Earl of Southesk, or the Earl of Traquair, his author, were not obliged to produce these instructions, but that it was sufficient that Philiphaugh, in his majority, had ratified the factor's discharge of his intromissions with that sum ; but reserved action against the factor himself, and his heirs, as accords.

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1670. *January 18.* GEORGE TURCAN *against* SERSE TURCAN.

IN a declarator of the expiring of the reversion of certain lands, given in wadset to the said George, upon bond, for payment of the sum of 700 merks to Margaret Primrose and her husband, the longest liver of them two, and their heirs ; in which wadset the reversion was suspended for twenty-one years ; which were expired :—It was ALLEGED, That the payment of the bond was not instructed by the discharge, being granted by Margaret Primrose only ; because she was only liferenter of the said sum, and her son fiar, who behoved to subscribe the discharge ; otherwise Serse Turcan, granter of the wadset, was not *in tuto*.

The Lords, having considered the bond made to the said Margaret, which did bear, that it was payable to her and her husband, and, failing of them by decease, to their said son and heir ; and that the said Margaret had, in the discharge, acknowledged that she had received the sum of money, to be employed for her liferent use only, and to the behoof of her heir after her decease, notwithstanding of the conception of the bond, which made her fiar, did find, That it ought to be instructed, that the money was so employed for the behoof of the heir, and therefore that he ought to be cited to this declarator.

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1670. *January 26.* MACQUEAN, Minister in Edinburgh, *against* MR PETER PEARSON.

MR John Macquean, sometime minister at Carmichaell, having charged the heritors for payment of his half-year's stipend, from Martinmas 1668 to Whitsunday 1669, compearance was made for Mr Pearson, who was minister, and succeeded to Macquean ; who ALLEGED that he ought to be preferred, because he was presented by the Marquis of Douglas, who was patron, to the whole year 1669, before that the lands were sown that year, on the separation of the crop ; and that Macquean, being called to be minister at Edinburgh, had received stipend for that half year.

The Lords, notwithstanding, did prefer Macquean ; seeing it was confessed, that he had served the cure at the kirk of Carmichaell, till March, in the year 1669, and that Pearson was not admitted till after Lammas ; so that, in