1670. *June* 16. ANENT SEASINES.

FOUND, That *falsa designatio* of lands in a charter or seasine *non obest nec vitiat*, the said lands being otherways sufficiently demonstrated as by the heritor, superior, their bounding, the parish wherein they lie, &c. The error was that the seasine bore they lay within the Sheriffdom of Wigton, whereas they lay in Dumfries-shire. *Advocates' MS. No.* 18, *folio* 73.

1670. *June* 16. ANENT MINORS.

WHEN a minor or pupil is lawfully charged to enter heir, &c. their tutors or curators need not to be called, in regard it is not a fact prestable by them. *Advocates' MS. No.* 19, *folio* 73.

1670. *June* 17. The VASSALS of DUNYKEIR *against* the LAIRD.

JOHN WATSON of Dunykeir, or Pathhead, having set several parts of his lands in feu to sundry persons, with the servitude of casting feal and divot in a large adjacent moor, which belonged to him in property, in the said whole moor, or in any part thereof they pleased, for beiting and repairing of their houses, &c. Thereafter Watson feus out the said moor to others, in property, without mentioning the foresaid servitudes; at least grants new servitudes therein, by which the former feuars, his tenants, finding themselves enormly prejudged and lesed in their privilege of casting, &c. in the said moor, in respect the same was exhausted and surcharged, *viz.* burdened with more than the said moor was able to afford; they raise a declarator against the heritor of the moor, their master, to hear and see it found and declared that it shall not be lawful for him for to burden the said moor to the prejudice of the prior servitude, constituted with his own consent, (and that for most onerous causes, *viz.* sums of money paid to him therefore,) in favours of thir pursuers; and that his power of burdening the said lands may be expressly restricted, that he do nothing in the said moor which may be prejudicial to the servitude already granted to them; and what he hath already done, of that kind, the same may be declared null and void, especially considering that by their feu infeftment *unaquæque gleba iis serviebat.*

Against which declarator it was ALLEGED, 1*mo*, That it was a mere novelty, inferred an odd conclusion, and was *res pessimi exempli* for tenants to seek such a declarator against their master. 2*do*, No process at the instance of such of thir tenants against the writs of whose lands the heritor has obtained certification. 3*tio*, No process at the instance of those who have bound themselves under their hand, to the defender, that they shall never quarrel any posterior

servitudes imposed by him in the said moor. This 2d and 3d allegeances were found relevant.

Then, 4*to*, the heritor of the said moor having reserved to himself the property or *jus dominii* in this moor, thir tenants, by virtue of the servitude constituted to them, can never be heard to impede the heritor from free and absolute using of the said moor at his pleasure: otherwise this inevitable absurdity should follow, that the right of a servitude should be of greater force, and be more effectual to him to whom the servitude is constituted, than property should be to the heritor; which everts the very nature of dominion. *Item*, where it is said that *unaquæque gleba serviebat*, that is not *Judaice interpretandum*, but *secundum bonum et æquum et* κατ' ἐπιεικειαν. *Item* if the conclusion of this summons were good, then the first feuar having the said privilege of casting in the said moor most amply set down in his charter, might have hindered the 2d, 3d, or 4th feuars, (to whom the said servitude was constituted in the same manner, and as amply as to the first,) from using their said privilege therein, *item* might have impeded the heritor from granting any other servitude in the said moor before his; which were very absurd. (Item, *dominium* is *jus libere utendi fruendi nisi lex vel pactum obstet*; but here the heritor's *pactum obstat*, and restricts his dominion.)

To this it was ANSWERED,—That the *ratio disparitatis* was very clear, for the reason why the 1st could not debar the 2d, 3d, or 4th, &c. is, because as yet his servitude is not prejudged by theirs, but the moor is sufficient for them all; which it is not now, in regard the same is overburdened.

The Lords laid weight on the prejudice libelled, and granted a commission for trying the same; the report whereof was, that the said moor was wholly burdened, save only three acres; whereon the Lords sustained the declarator, and restricted the heritor, that he might not burden that moor any farther; but only the three acres that were free. See 20th *January*, 1680. *Muir of Montreumont and Earl of Southesk.* *

Act. Mackeinzie. *Alt.* Lockhart and Cheap.

Advocates' MS. No. 20, *folio* 73.

1670. *June* 17. ANENT EXECUTORS.

THE Lords found that *juramentum æstimatorium* given by an executor confirmed, did not bind him for any farther nor for the prices he could get, seeing it is only *juramentum credulitatis*; though it was ALLEGED that though it could not operate against a third party, yet it should operate against the giver.

Advocates' MS. No. 21, *folio* 74.

* The Lords also found that Dunykier, the heritor, albeit he had granted servitudes of pasturage and feal and devot on this moor, yet, since before the constitution of the said servitude, he was in use to labour and till parts of the said moor, he might continue his possession of labouring and tilling, though it prejudged their servitudes, because he only constituted them as the moor then stood, and not *seipsum gravare*. See *lex* 13 D. *De usufructu, et passim dicto titulo.*

Quod omnes tangit ab omnibus debet approbari, Cap. 29. *de Regulis Juris in* 6*to. L. ult. C. de authoritate prestanda. Argumentum L.* 8. *D. de aqua et aquæ, &c. valde huc facit. Vide Dumnum eleganter ad dictam regulam* 29. *in* 6*to. Vide infra June* 1677, *No.* 579. *S.* 11. *Vide L.* 13. *S.* 1. *Digestis de servitutibus rusticorum.*