

1679. *November 12.* PATRICK COCKBURN *against* JANE BLACKBURN and JAMES WOOD her Husband.

PATRICK Cockburn of Borthwick against Jane Blackburn and James Wood her spouse. The Lords simply annulled a decret in absence, pronounced on the 31st day of July, because it was not a sentence done in the Inner-House, and the 31st of July is not a sitting day in the Outer-House. But if it had been pronounced before, and scored out for not paying the half-crown for the macer's dues, and then put up in the minute-book as dated the last day of the Session, this would suffer more debate.

In this case Newton likewise found, that Patrick Cockburn's retour, as heir to his father, was not a title in this declarator of the expiration of a back-tack in a wadset, but he behoved also to be infeft in the wadset lands, and to produce it; but found, though this objection was competent to the heirs of the granters of the wadset, yet it was *jus tertii* to the relict, though she had a liferent infeftment, because it was posterior to the wadset. *Vol. I. Page 63.*

1679. *November 13.* ANENT EXECUTORS-CREDITORS.

THE Lords made an Act of Sederunt, determining what diligence executors-creditors should be obliged to do for discussing the inventory of the testament. *Vol. I. Page 63.*

1679. *November 13.* WILLIAM SOMERVILLE *against* His CREDITORS.

MR William Somerville seeking to come out of prison on a *cessio bonorum*, and a disposition offered by him to his creditors, he having, before his incarceration, disposed all his lands and other estate to his son, (which may be reduced on the Act 1621, but cannot be summarily annulled,) and the Creditors offering to aliment him in prison; the Lords refused to liberate him; but in the mean time ordained him to depone on the truth of the disposition offered by him, and modified two groats to him *per diem*; and in case weekly, at each Saturday, it were not paid him, then they appointed him to be set at liberty, he wearing the habit. *Vol. I. Page 63.*

1679. *November 14.* The FEUARS of DIRLETON *against* SIR JOHN NISBET of DIRLETON.

In a declarator of a servitude of pasturage, quarrie, lime-stone, birlaw-courts, &c. raised by the Feuars of Dirleton against Sir John Nisbet; Newton would not sustain a naked seasine as a sufficient active title in the said declarator, till the charters, precepts of *clare constat*, and the other warrants of the seasines, were produced. *Vol. I. Page 64.*

ANENT EXECUTIONS OF INHIBITIONS.

NEWTON annulled an inhibition, because it wanted the three several oyses at the market-cross, though it was positively offered to be proven that they were truly made; because the expressing them in the execution is *de forma ejus essentiali*, and cannot be supplied. *Vol. I. Page 64.*

1679. November 15. Bust against ———.

IN a case betwixt one Bust and ———, an assignee charges for a sum. The debtor suspends upon this reason, That he offered to prove, by the charger's oath, the assignation is to the cedent's behoof; which being confessed, then he proponed payment or compensation against the cedent. The assignee appears, and depones that it is to his own behoof, but that he had got an assignation to a debt on thir terms: that, if he could recover payment, then to pay himself therewith; if not, then the cedent was still to be his paymaster, and not to be exonered of the debt.

The Lords, at the advising of this oath, had some inclination to find this assignation was upon the matter to be reputed to the cedent's behoof, seeing it was not taken by him in satisfaction, but only as a collateral security, and in corroboration; but it was not fully decided. *Vol. I. Page 64.*

1679. November 15. GEORGE YOUNG of WINCHBURGH against WILLIAM NICOL, Trumpeter.

GEORGE Young of Winchburgh charges William Nicol, trumpeter, to count to him for the assignation he had given him to Kennoway's back-bond, and to the gift of Hugh Sinclair's liferent-escheat. Nicol's reason of suspension, with respect to the gift of the liferent-escheat, was, that he had done all legal and necessary diligence against the tenants, by imprisoning them; and they came out upon a suspension and multiplepoinding, wherein, at the discussing, many creditors of Hugh Sinclair's, who had real rights on the lands, were preferred to him, and he secluded and debarred by them, they having been clad with possession prior to Hugh Sinclair's denunciation to the horn.

ANSWERED,—Ought to be repelled; because it is offered to be proven, that the rent of the lands falling under the escheat are worth L.200 sterling *per annum*; and that the annualrents of the preferable infestments were within 2,400 merks yearly, so that there was an annual excrescence of 1,200 merks yearly, which Nicol might have uncontrovertedly affected; and so, not doing it, he was *in mora*.

Newton very justly appointed both parties to count and reckon, and George Young to prove the rental of the escheat lands, and William Nicol to prove what preferable rights debarred and secluded him from the possession, that, *ex eventu* of both probations, it may appear if there was any excrescence.