

1628. *January 30.* The LAIRD of KNOCKDOLEAN *against* The TENANTS of PARTHICK.

If one hath servitude of pasturage in any ground, he cannot be decerned to remove from the same. *Page 277.*

---

1628. *February 2.* KIRKONNEL GORDON *against* The LAIRD of BARNBARROW.

In a general declarator of the Laird of Barnbarrow's liferent-escheat of some lands holding of the Bishop of Galloway, pursued by Kirkonnel Gordon, the warrant of the summons bore, to summon the defender upon sixty days. He having apprehended him personally, summoned him as personally apprehended, and not upon sixty days; whereupon the executions were excepted, as contrary to the warrant. But the Lords sustained it.

The like was found betwixt one Glen and the Lord Harris, 12th July 1623. *Page 101.*

---

1627. *July 19 and 25; and 1628, Feb. 3.* WILLIAM AULD *against* PATRICK JACK.

WILLIAM Auld, executor dative *ad omnia*, to his mother, pursued Patrick Jack to make him payment of 33 barrels of salmon, or £20 for the price of ilk one of them, alleged resting owing by the said Patrick to umquhile James Jack, grandfather to the complainer. Alleged, Absolvitor, because the ground of his debate is only a judicial act, made 1584, before the commissary of Aberdeen, which is null in law, and can produce no action in favours of the complainer, it being neither contract, bond, decret, nor sentence of a judge ordinary, and so cannot oblige the party alleged bound thereby: Likeas, by Act of Parliament, 1574, all writs of importance should be subscribed by the parties, or two notaries, at their command, before four witnesses. Replied, That the allegiance ought to be repelled, in respect of the act produced, which was at the time the ordinary form of that court, as can be verified by great numbers of acts yet extant: And further, the excipient has in effect homologated the said act, by his compareance thereafter before the said commissary, and acknowledging the said debt, and so cannot quarrel it. Duplied, That the custom of the court cannot be respected, being contrary to law and the Act of Parliament, 1579. *2do.* The homologation not relevant, *quia laborat eodem vitio*, it being only done by another judicial act, without his having subscribed any act of ratification of it. The Lords repelled the exception, and sustained process upon the said judicial act.

The reason why this judicial Act was sustained, was in respect of a decret of transferring of the same Act, given against the excipient, 1590; which decret of transferring stood unreduced. Upon the 25th July following, some nullities being proponed by way of exception against the decret of transferring, *viz.* That it had not the Act transferred ingrossed therein, according to the custom of all transferrings; *2do.* That it was given without any probation, or

any cause insert therein ; for, it being founded upon a testament, which was the pursuer's title at the time, (for he sought that Act to be transferred in him *active* as executor to his mother Catharin Chalmers, to whom the debt was owing,) there was no mention made of the production of the said testament in the decret of transferring. The Lords, notwithstanding of these nullities, would sustain the decret of transferring *ad hunc effectum*, to make the first judicial Act subsist.

Page 64.

1628. February 6. MARGARET CUNINGHAM *against* PETER MACKULLOCH and OTHERS.

MARGARET Cuningham having pursued Peter Mackulloch and others, for spulyieing from her, six oxen, and so many bolls of meal ;—excepted, That they were given to the defender by her for satisfaction of some mails and duties, owing by her umquhile husband to my Lord Cassils. This exception was sustained, the defender condescending upon the particulars owing by her husband for his mails, and proving that they were owing the time of his decease, albeit it was contrary to the libel.

Page 90.

1628. February 9. GERARD BIRKHEAD *against* WILLIAM NAIRN, Parson of Dysert.

GERARD Birkhead, attorney, constitute-for N. Englishman, pursued Mr William Nairn, parson of Dysert, for £13 sterling, conform to his bond. The defender desired, that, since he was to reconvene the pursuer, he might have caution of him to answer him for what he had to lay to his charge, conform to the common law. *L. 2. t. 57. Cod.* A great part thought the desire agreeable both to law and practise ; but the most part thought there was no necessity for his finding caution before the defender had intented action against him.

The like was found between Pyramine, Frenchman, and Patrick Ramsay's children, 15th July, 1628.

Page 306.

1628. February 9. The HEIR of ALEXANDER ANDREW *against* LORD COLVIL.

THE heir of Mr Alexander Andrew charged my Lord Colvil for so many bolls of victual, for the annual-rent of a certain sum of money owing to him by my Lord, conform to his bond. Alleged by the defender, He could not be liable in payment of greater annual-rent than amounted to ten in the hundred, according to the Act of Parliament 1597. Replied, That the bond was made before the Act, and the Act was only extended *ad futura*. The Lords, conform to a former practise between N. burgess of Perth, and the Earl of Tullibardin, *in anno* 1624, found the letters orderly proceeded, providing that, if the defender made payment of the principal sum and the bygone annual-rents, effeiring to ten in the hundred, at Whitsunday next, they shall be suspended *simpli-citer*.

Page 353.