that in lieu of the lands adjudged to the heritor making the inclosure, an equivalent piece of his land be adjudged to the other party. So that this being a petitory action, it ought not to be sustained without production of the pursuer's title *in initio litis*, more than actions of molestation, or for dividing of commonties or runrig, are sustained without an active title produced with the summons.

ANSWERED for the pursuer,—There is *no lis alibi pendens* here, seeing the process before the justices was deserted before litisconstestation. Besides, there are no Justices of Peace in effect now in being in Scotland, since the old set were exauctorated by King William's death, and the expiring of the last Parliament; and no new ones have been appointed since her Majesty's accession to the throne. 2. Possession without any more is a sufficient title for commencing such a process, and carrying it on the length of a visitation: though when the Lords come to adjudge, the defender will have interest to see the pursuer's right to the equivalent land to be adjudged. And yet even then there is no hazard: for an heritor afterwards emerging, could not be heard to claim, upon a better right, the lands adjudged from the defender, without quitting his ground inclosed. And it may fall out that of the two alternatives provided by the act of Parliament as a recompense for the ground taken off to make the pursuer's dike run in a straight line, viz. The equivalent in ground, or the value in money, that the defender choose to have money: in which case there will be no need for producing the pursuer's right to his lands. But yet he is content to produce his charter and seasin *cum processu*.

The Lords repelled the first dilatory defence *simpliciter*, and repelled the second; the defender producing his infeftment *cum processu*. And appointed the Earl of Lauderdale, Justice-Clerk, Fountainhall, and Prestonhall, or any two of them to visit and perambulate the ground, and to take trial of the value of what is sought to be inclosed, and how it might be done with the least inconveniency to Lord David Hay, and what compensation should be given to him in land or money. *Page* 92.

1706. *February* 8. GRISSEL EWART *against* ANDREW EWART, Minister at Kells, her father.

MR. ANDREW EWART having granted bond in the 1695, narrating that the sum of 6000 merks, provided in his contract of marriage with Mary Canon, the pursuer's mother, for the daughters of the marriage, failing male children, was not sufficient, and therefore obliging himself and his heirs, secluding executors, to make payment of the sum of 10000 merks to the daughter or daughters of that marriage in case there should be no male children to enjoy his estate; and the marriage having dissolved by the death of the said Mary Canon without any male children; Grissel Ewart, the only daughter, pursued her father for payment of the 10000 merks with annual-rent thereof since her mother's death.

ALLEGED for the defender,—That his obligement contains no definite term of payment, nor any clause for annual-rent; but was only to take effect in case he, wanting heirs-male of the marriage, should give away his estate to other heirs-

male, and so disappoint the lineal female succession; which hath not yet existed, nor can be known till his decease.

REPLIED for the pursuer,—The true meaning of the bond was failing sons of the marriage, to pay 10000 merks to the daughters, one or more, which case existed so soon as the marriage dissolved, the dissolution whereof must be the term of payment. For had the payment of the sum been industriously delayed till after the father's death, some clause had been inserted importing so much, either expressly, or tacitly, by obliging only the father's heirs and not himself to pay, or by reserving his liferent. 2. The daughter had been very ill secured by the bond, if during the father's lifetime she could neither uplift the money, nor crave annual-rent nor any portion if married. Especially considering, that by the conception of the bond heirs only and not executors are bound, and the father might make all his estate moveable.

The Lords found the sum payable presently.

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1706. *February* 13. The DUTCHESS of HAMILTON *against* DANIEL CAMPBELL, Collector at Port-Glasgow.

IN the action mentioned *supra*, January 18, 1706, at the instance of Daniel Campbell, collector at Port-Glasgow, against Sir Alexander Anstruther, the Lords having found, that Mr. Campbell's letter did not empower Sir Alexander to enter into a minute of sale with the Dutchess; compearance was made for her Grace, who claimed the benefit of the clause in her favours in the said letter, viz. that she might have the bargain upon such a reasonable consideration as the Lords should modify.

ANSWERED for Daniel Campbell,—The clause in his letter, imports no concession or ground of claim in favours of her Grace, but only *verba officiosa*, a fair compliment at most, or velleity to treat with her if she were desirous; which obliged him to nothing, far less to dispone an heritable right without any treaty or agreement, at the Lords arbitrement. For the letter was not writ to the Dutchess, nor is it found to liberate Sir Alexander, to whom it was directed. And her Grace, not being bound to Mr. Campbell to accept of the bargain, it is inconceivable why he should be obliged to let her have it: and her now declaring her acceptance signifies nothing; for, if third parties should be allowed to catch at words passingly spoke betwixt others, all common converse would be dangerous and ensnaring. Yea, a letter declaring that the writer was not to pass from a certain verbal communing, was not found obligatory to cut off *locum penitentiæ;*—January 28, 1663.

REPLIED for the Dutchess,—Letters are as obligatory as other writs, to justify the receiver as to any thing that follows in consequence thereof;—January 3, 1677, Earl of Argyle against L. of M'Naughton. As for the decision 1663, it concerns not the case in hand; for there Brown's letter did only express his resolution to adhere to a verbal communing, which could not deprive him of his *locus penitentiæ*, seeing the bargain was to have been perfected in writ; where-