

Laird of Shaw being admitted for his interest, Alleged, That the purchaser of the brieves could not be served to Sir Peter, because the said Sir Peter was bastard, and so could not have an heir, *cum nullam haberet agnationem*. In this matter, the judges disagreeing among themselves, they gave in a supplication to the Lords, desiring to have their advice upon the matter; who, after they had considered it by way of advice only, (remitting it to their own consciences to discern as they thought fittest,) gave their answer, That they thought it neither competent to the defender to propone, (he nor any others having interest, but the king only;) neither yet was it relevant to allege bastardy against the person to whom another sought to serve himself, but only against him that sought the service, *quo casu quæstio natalium ad judicem Christianitatis remittenda erat*, and in the meantime the service should be stopt; otherwise, if there were such an allegiance sustained, there should never a service go on, *præsertim in facto antiquo*.

Page 30.

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1629. January 20. The EARL of GALLOWAY against GORDON.

THE Earl of Galloway pursued one Gordon for the rental bolls of certain lands, which, as he libelled, were in use to pay so many bolls, at least so much money for so many bolls, (*viz.* 40 shillings or three pounds,) yearly. The Lords found not that alternative relevant; for they thought a man paying but a mean duty for his rental bolls, would never quarrel it, albeit he paid for more than the land was rentalled to; but, when he was compelled to pay conform to the fiars of the country, he had reason to allege why that should not be a sufficient probation of the number of the rental bolls against him. Afterwards the pursuer offered to prove payment of the price of so many rentalled bolls sundry years, equivalent to the fiars of the country. Yet the Lords would not sustain that as relevant to infer the payment of so many rental bolls libelled; but only to astrict the defender to pay the highest prices that the pursuer could prove he had gotten from him at any time before.

Page 290.

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1629. January 22. FREDERICK CARMICHAEL against THOMAS GOURLAY of KINCRAIG.

IN an action pursued by Mr Frederick Carmichael against Thomas Gourlay of Kincaig, as lawfully charged to enter heir to his grandfather, there was a day taken by the defender to renounce; and, *in termino*, he produceth his renunciation. Compeared Alexander Cornfat, creditor to the said umquhile grandfather, who, being admitted for his interest, alleged, that the defender cannot be heard to renounce in favours of the pursuer, and in his prejudice, who was a lawful creditor, because the said Alexander had action depending against the said defender as lawfully charged to enter heir, and also as behaving himself as heir; and it was not lawful to the defender, by offering a voluntary renuncia-

tion, to prefer the pursuer to any other creditor, to the effect that the pursuer might obtain sentence of adjudication first; neither was it lawful to the pursuer to accept a renunciation from the defender by collusion; because he offered him to prove that the pursuer omitted a competent reply, which the said Alexander alleged by way of exception, *viz.* That the defender cannot be heard to renounce:—*1mo.* Because he has curators, and they have not subscribed the renunciation produced: *2do.* He has behaved himself as heir to his grandfather by intromission with his heirship-goods: *3tio.* The gift of the ward of the half lands of Kincaig, holding of the Laird of Lundie, is granted to the defender himself, or the donator for his behoof. Answered, This creditor could not stay the accepting of this renunciation, because the pursuer will accept it with his hazard, and let Alexander go on in his cause as he pleases. The Lords repelled all these allegiances proponed by Alexander, and would not stop the pursuer's action, who had used greatest diligence.

Page 140.

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1629. *January 22.* HENRY FAIRBAIRN *against* BARTILMO KELLO.

HENRY Fairbairn being addebted in 1000 merks to Bartilmo Kello, by virtue of letters of caption, was apprehended and incarcerated, by Bartilmo, in the tolbooth of the Canongate; out of which he having escaped, Bartilmo obtained a decret against the bailies and jailer for suffering him to escape. They, to free themselves of the debt, intent an action of reduction and restitution, *in integrum*, in name of the said Henry Fairbairn, against Bartilmo, *ex capite minoritatis*. In which action there was an exception proponed by Bartilmo, that he offered him to prove that the said Henry was major the time of the subscribing of the bond. For proving of the which exception there was a day assigned to the expient. Before the day, the defender raiseth a summons against the said Henry, to give his oath *de calumnia*, that he had just cause to pursue the libel. The day taken by the defender to prove his exception being come, and he having produced nothing for proving thereof, the pursuer extracts an act, and craves the term to be circumduced. Answered, He ought not to produce any diligence before the pursuer gives his oath *de calumnia*. Replied, That the action being pursued to the behoof of the bailies and jailer, and for their relief, although they used Henry's name, his contumacy could not prejudice them; yea, albeit he were present and would depone, yet he could not do it in their prejudice, he being bankrupt, and bearing ill will at them for detaining him in ward. The Lords would not hold Henry as confessed, to work any thing in prejudice of the bailies and jailer. Further, the said bailies and jailer craved that the said action of restitution, *in integrum*, might be transferred in their persons. Answered, The action could not be transferred, seeing there can be no transferring but in the person of an heir or successor, &c. The Lords sustained the transferring.

Page 183.

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