

no warrant from his master to take it. Fairholme, on the sight of this receipt bids him quickly return it to the Colonel, and take another receipt, as of borrowed money, which the Colonel refused. When this came to be debated, it was found to be an acceptance of the bill, and Fairholme was decerned to pay the whole sum, because of the exuberant faith in bills of exchange.

Act. Sinclair.

Alt. Maxwell.

MS. folio 51.

1662 *November 12.* Lord BURGHIE *against* LAFODDIE in Fyffe.

IN a case betwixt thir parties, found that a base charter of kirk-lands clad with possession, but not confirmed till long after the possession, is preferable to a public infestment confirmed before; and that in respect the base infestment was clad with possession long before the other's confirmation, and that but interruption: and that the subsequent confirmation of the base right, though posterior to the other's public confirmation, was drawn back to the date of the base seasine clad with possession, as said is.

Act. Cunyghame. *Alt.* Nisbet.

MS. folio 51.

1662. *November 15.* THOMAS NICOLSONE *against* GEORGE BALFOUR of Balbirnie.

MUTUAL molestations being pursued by Mr. Thomas Nicolsone and George Balfour of Balbirnie of either of their possessions of the Mure of Bigtie, adjoining to both their lands: Mr. Thomas being infest in Pittenthass *cum pastura et libero introitu et exitu*; the other being infest in Markincsh *cum communi pastura in mora de Bughtie*:

The Lords found Mr. Thomas his infestment, with forty years possession in the said mure by pasturing, relevant; but because Balbirnie alleged he was *per expressum* infest in that mure, and had interrupted Mr. Thomas *via facti* from pasturing, &c. therefore they ordained Mr. Thomas to prove forty years possession before the alleged time of Balbirnie's interruption: and they inclined that if Balbirnie had raised a declarator of property, or right on his infestment, he might have debarred Mr. Thomas. But the judgment being possessory, they sustained Mr. Thomas his interest *cum communi pastura*, he proving *ut supra*.

Act. Nisbet and Balfour.

MS. folio 51.

1662. *November 15.* BURNET *against* _____.

IN this case, found that an executor pursuing for a debt owing to the defunct testator, who was neither merchant, venturer, nor factor: and the debtor alleging

that, by the testator's own count-book, the debt is paid him in his lifetime, which is equivalent to a discharge ;

REPLIED,—That though in other cases, *privata scriptura facit fidem contra scribentem*, yet to force the executor to produce the testator's count-book, to take away a debt constituted by writ, were hard, he never being factor, merchant, &c. ; for the case was put as, if the testator had left a discharge subscribed, beside himself, undelivered, can any in reason thereon think the debt is discharged? Notwithstanding whereof it was found that, by the testator's count-book, the debt was discharged, though the bond was not retired.

Act. Nisbet. *Alt.* Lockhart.

MS. folio 51.

1662. *December 3.* LADY EDNEM, *against* _____.

IN this case found, that a pension is not a real right, so as to tie a singular successor in payment thereof.

Act. Lockhart.

MS. folio 52.

1662. *December 3.* SINCLAR *against* SPOTISWOOD.

THE case was, Peirsone having wadset his lands to Hamilton ; and finding that the wadset-granter was inhibited before his right, by a lawful creditor ; he transacts with the said creditor, and takes assignation to the bond, and hail diligences raised thereon ; and then charges Duncan, who is cautioner for the debtor in the bond, to pay the debt : who, suspending that he was willing to pay the debt, the assignee giving him a right to the bond, and hail diligences used thereon, for his relief against the principal ;

ANSWER,—He could not assign him to the inhibition, because it might then affect his own right of wadset made to him thereafter.

The Lords found he behoved to assign, or else to discharge the cautioner of the debt ; and that the charger had a design to cheat the suspender of his right.

Act. Spotswood. *Alt.* Sinclair.

MS. folio 52.

1662. *December 3.* _____ *against* _____

FOUND, in a case betwixt two donators, that the first expedite gift, with the first summons, raised, executed, and called, ought to have the preference of the other, though they were both ready to debate on one day.

Dinmuire. Stewart.

MS. folio 52.