

fender was assignee to £20,000 worth of bonds, by which he had redeemed all former apprisings; as likewise, that the defender's right was affected with a reservation of a power to the disponent to burden with 5000 merks, whereof the bond pursued on was declared to be a part.

The Lords, before answer, did ordain both parties to be heard upon these grounds.

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1670. June 17. BYRES *against* BAILIES of HAMILTON.

BYRES, and some other creditors of George Lyles, having gotten a disposition of the whole merchant ware in Lyles' shop, and of the plenishing of his house, which they caused intimate publicly, at the market-cross, to the bailies, who, notwithstanding thereof, did shut up the doors, by putting on a plate of iron, and thereby debarring the said creditors from entering to the possession till other creditors got entry to the house, and took away the goods: There was a pursuit intended against the bailies for damage and interest.

It was ALLEGED by the defenders, That what was done by them was lawful, and *ratione officii*; in respect Lyles, the common debtor, was bankrupt, and had fled in the night-time out of his house, when he made that disposition.

The Lords, notwithstanding, did sustain the summons, unless the defenders could allege, that what they had done was upon the complaint of several creditors, or others concerned; and that they had preserved the goods to be forthcoming to any should have the best right.

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1670. June 22. BELSHISH *against* PORTERFIELD.

IN a declarator, pursued at Toft's instance against Sir Laurence Scot and Mr Alexander Spoteswood, advocate; the Laird of Crawfordland having right to a bond, wherein the Laird of Wedderburn was principal, and Tofts cautioner, he caused lead a comprising against Wedderburn, which did expire *in anno* 1664; as likewise did adjudge Tofts the cautioner's whole estate; but, before the expiring of the legal thereof, he did enter into a transaction with the pursuer, Tofts, who should have satisfied the debts, and thereby freed his own estate of the adjudication, and made use of the expired comprising against Wedderburn only, for his relief. Notwithstanding whereof, Mr Alexander Spoteswood, being employed for the pursuer, did induce Sir Laurence Scot to purchase the said right from Crawfordland, both to the comprising and adjudication, which was likewise expired; and therefore craved, in respect that the said Mr Alexander had prevaricated, that the right purchased in the name of Sir Laurence Scot might be declared not to affect the pursuer's lands. The second ground was, that Sir Laurence's right was purchased in the name of Sir Laurence only, for the sums advanced by him, to have been satisfied by the Laird of Wedderburn, or by the said Mr Alexander, for his behoof: which Wedderburn being the heir

of the principal debtor, no right could be taken for his use in prejudice of the pursuer, who represented the cautioner; and therefore, the adjudication of his estate being purchased, as said is, ought to be declared null; whereupon they craved that the Lords might examine witnesses *ex officio*.

It was ANSWERED for the defender, That the right made by Crawfordland, both of the comprising and adjudication, being now in his person for an onerous cause, could not be taken away but *scripto* or his own oath; so that it was needless to examine witnesses *ex officio*. And as to any alleged prevarication of Mr Alexander Spoteswood, it could not prejudge him; unless it were proven, *scripto vel juramento*, that it was to the behoof of the said Mr Alexander, and that his name was only borrowed.

The Lords, before answer, did ordain the said whole defenders' oaths to be taken, *ex officio*, and any other to be condescended on by the pursuers, who had a hand in the said transaction; and that in respect of the importance of the cause, and that there was a near relation between Sir Laurence, Alexander Spoteswood, and the Laird of Wedderburn.

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1670. June 23. The FEUARS of DUNNIKEIR *against* JOHN WATSON their Superior.

THE Superior having obtained decret of declarator against his vassals,—finding, after visitation of the ground, and report made, that he having given feus to 180 persons, with the privilege of quarry, clay, and divots of the Moor of Dunningkeir, belonging to him in property, notwithstanding of any servitude foresaid, he might rive out and labour three acres thereof for his own use; yet with this quality, that, if the whole rest of the moor should not prove sufficient for the feuars' building and upholding of their houses, they might have recourse to the same three acres. The feuars, upon this decret of declarator, did intent a new declarator, at their own instance, against their superior, and some other new feuars, to whom he had granted the same privilege and servitude, concluding against them, that he had no power, in prejudice of the foresaid decret, to grant any servitudes, which would exhaust the moor, and make their right ineffectual.

It was ALLEGED for the superior, That he having *dominium*, and being proprietor of the whole moor, and the vassals' having only servitudes, any such right they had, did not take away from him a full liberty to make use of his own property at his pleasure; seeing, in law, *dominus potest uti re sua ut libet*; and, in all servitudes, as that of *communis pastura*, and others, there is a reservation in law to the superior, to make use of the ground and property for himself.

The Lords found the defence relevant, and ordained a new visitation: which was most hard, and contrary to their first decret; finding that the superior having granted servitudes to so many vassals, as the ground could not serve them to take in any new vassals; that he had no power thereafter to take from them the benefit thereof; which was just and consonant to law, they having *jus quæsitum*, both by the superior's own deed and by a decret of the Lords.

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