

not be enlarged; and a horning has all its civil effects, notwithstanding of a protection, save only caption; so that annualrent will be due thereon, his escheat may be gifted, and so of all the rest.

*Advocates' MS. No. 316, folio 127.*

1672. *February 6.* Mr. JOHN BAYNE of Pitcarly *against* Mr. GEORGE SCOT of Pittedy.

THE Lords having advised the debate betwixt Mr. John Bayne of Pitcarly and Mr. George Scot of Pittedy, with the depositary, Mr. Robert Reull, his oath, they found the minute obligatory, and ordained the same to be given up by Reull to Pitcarly; notwithstanding it was alleged that the same was not a delivered evident, but only consigned till next meeting, at which time sundry things controverted betwixt them were to be communioned on; so that it being an unconsummated bargain, there was *locus pœnitentiæ*, likeas he did resile *debito tempore*; see Balmanno's practiques *verbo* Penalties, page 224, *et seq.*; as also, he offered to pay the penalty to be freed of the bargain, which penalty was 4000 merks; which the Lords repelled, as being over and above the performance. See it so decided on the 5th of *March*, 1634, *Murray* against *Lord Blantyre*; *March 19, 1630, Crichton*. But in regard, it was controverted betwixt them, whether Pitcarly should take, in part of the price, a bond of 20,000 merks, granted to Mr. George, by William Calderwood, who acquired the lands of Pittedy, seeing the same was clogged and affected with sundry conditions, and expressly that William Calderwood should retain it ay and while the lands of Pittedy were disburdened of the incumbrances condescended on, which are not yet purged; the Lords recommended to two of their number to consider how the said bond might be made effectual to Pitcarly, so that he might accept it in part of the price of his lands. See the information of it beside me.

*Advocates' MS. No. 317, folio 128.*

1672. *February.* SIR GEORGE GORDON of Haddow *against* The LAIRD of COCKBURNE.

ABOUT the beginning of this month was the debate betwixt Sir George Gordon of Haddow and the Laird of Cockburne, wherein the case was as follows; Bailie Mercer being debtor to Haddow in the sum of 3000 merks, and Cockburne being bound for Mercer in sundry considerable cautionaries, he obtains for his relief an assignation to a bond of 4000 merks, amongst many other bonds due by the Laird of Cragievar to Bailie Mercer. Haddow hearing the Bailie was breaking, and had disposed on the most part of his estate, and particularly on that bond, he causes draw an assignation of Bailie Mercer's bond of 3000 merks to him in favours of Cragievar, Mercer's debtor, and delivers the same to Mr.

David Thoirs, as treater and communer for and in name and behalf of Cragievar, who accordingly accepts thereof; and this assignation made to Craigievar is intimated to Mercer, the debtor in that bond, I think a day before Cockburne could get his assignation intimated to Cragievar. This being the matter of fact; when Cockburne pursues for his sum, Cragievar ALLEGES he must have compensation, in so far as he was become creditor to Mercer, by Sir George Gordon's assignation to him, before Cockburne's intimation; and so being both debtor and creditor *vicissim, confusione tollitur obligatio*.

To this it was ANSWERED,—That they could not be heard to plead compensation on that head unless they would say that Cragievar knew of this assignation made to him by Haddow, and accepted of the same before Cockburne intimated his assignation, seeing it was only a northland, done of collusion and set purpose, to elude Cockburne's assignation; *et non amo nimium diligentes*; it was done without any onerous cause on Cragievar's part, and Haddow laid so small weight on this conveyance, that at the same time he, in his own name, and for payment of his debt, caused arrest the sum due by Cragievar, which by the course of nature was inconsistent and incompatible with his former assignation, whereby he was denuded of the right to that sum.

REPLIED,—That they needed not say that Cragievar knew of that assignation or accepted thereof before Cockburne's intimation, because of the law, *Si procurator rem mihi emerit ex mandato meo, eique sit tradita meo nomine, dominium mihi, id est, proprietas acquiritur etiam ignoranti*; l. 13 D. de acquir. rerum dominio; l. 34 p. 1, D. de acquir. vel amitt. possess. par. 5 Instit. per quas personas cuique acquiritur; so that all the law required was, that he give a commission for doing such a business or acquiring such a thing; which the mandatary accordingly acting, *mandanti ignoranti res illa acquiritur*. Vide Dumnum, in commentario ad regulam 3 Juris Canonici; Perezium ad Tit. C. de donation. quæ sub modo et condit. numero 8vo.

The Lords *referente Domino Craigie*, ordained Cragievar the alleged *mandator*, and Mr. David Thoirs the alleged *mandatarius*, to be examined before answer, whether Cragievar gave any commission to Mr. David Thoirs to treat with Haddow for that bond of Mercer's, and if Mr. Thoirs accepted the assignation in Cragievar's name, and for him intimated it to Bailie Mercer. Which if they grant, then I imagine the Lords will sustain the assignation made to Cragievar, though he was ignorant of it, because it was accepted by Mr. David Thoirs, who had a commission from him to that effect.

*Advocates' MS. No. 320, folio 128.*

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1672. February 9. The LAIRD of BALNAMOON against JOHN MACINTOSH.

THIS Macintosh having married his daughter on one Weymes, by the contract of marriage he is obliged to pay 2000 merks in name of tocher, to which 2000 merks Weymes is obliged to lay 3000 merks of his own monies; and which 5000 merks is provided to him and her and the longest liver of them two, in conjunct fee, and to the heirs of the marriage to be procreated betwixt them. Weymes being