

Lords, before they would admit any witnesses *ex officio*, ordained either party to produce all the writs they founded on, and assigned a term to that effect, and granted diligences to either party for summoning such witnesses as they thought fit; to this effect, that, if the Lords, upon perusal of the writs, should find just ground to examine witnesses, the witnesses might be ready without a new term; and the Lords might consider what persons they would allow to be examined as witnesses, of those that should be adduced for either party.

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1673. July 29.

BLAIR *against* BLAIR.

THERE being a contract of sale of lands by Ardlair to Denhead, Denhead was obliged for 2000 merks as the price; whereupon Ardblair obtained decret, of the Lords, for payment of the sum. Denhead raiseth suspension and reduction, on this ground,—That this sum being the price of land due by a mutual contract, the price could not be demanded till the disponder's obligations, which were the cause thereof, were perfected, *viz.* to cause Bagillo infest himself in the lands, and resign; after which there is a second contract, whereby Denhead ratifies the decret against him, and renounces his reduction and suspension; but it is provided, that if, between and such a day, Denhead should obtain decret against Bagillo for a greater sum, Ardblair should accept of it. The day being elapsed, Ardblair took Denhead with caption; who, being under caption, gave Ardblair a bond for the 2000 merks, and renouncing the obligations in the second contract: Which bond Denhead now suspends on this reason,—That this bond was granted *metu carceris*, he being under caption; and therefore could not hinder him to make use of his defence upon the first contract; and that he could not pay the price till they were secured in the land. It was answered, That, before any caption, he had ratified the decret whereon caption was used; and that this, being obtained upon a legal diligence, was no extortion, nor could it be reduced *ex capite metus*; for although parties giving bonds after decreets, being under caption, when they get no ease nor transaction, nor do not ratify the decret, but simply give bond, it is not accounted a homologation, more than if they had paid the money; in which case they must quarrel the decret; but here the decret quarrelled was ratified when there was no caption, and the obligations in the second decret were renounced. The Lords found, That there was here no relevant ground against the execution of this bond, upon pretence of the mutual obligations in the first contract; but reserved them by way of action, as accords.

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1673. July 31.

HAMILTON *against* KENNEDIE.

JOHN Weir having been heritor of the lands of Cumberhead, he wadset the same to Thomas Weir for a small sum. There was a second wadset by John Weir, younger, as being infest as heir in the lands (by a precept of *clare constat*.)

to the said Thomas Weir, renouncing the former wadset: Kennedie of Auchtifardel did acquire right to this wadset, and Hamilton of Raploch acquired right to the reversion: Thereafter Auchtifardel did take a new right from John Weir, the oy, and infeft him, as heir to his goodsire, passing by his father.—In the competition of which rights, it was alleged for Raploch, That the right of John Weir, the son, could not be quarrelled; because it was perfected by prescription, in so far as he produced the son's seasine *in anno* 1599, and the wadset granted by the son shortly after, which had been clad with possession much more than 40 years, and which was sufficient, without production of the precept whereupon the seasine proceeded, conform to the Act of Prescription; so that the son's right being perfected, no right derived from the oy, as heir to the goodsire, passing by the son, could be respected. It was answered, That the Act of Prescription excepted falsehood; and the son's seasine behoved to be false, because it was offered to be proven that the father lived seven years after the date of the son's seasine; so that that seasine could not make him have right as heir to the father. And there being a mutual probation allowed for instructing the time of the death of the first John Weir, Auchtifardel adduced several witnesses, some past 80, and one past 100 years of age, who deponed, that the first John Weir died *in anno* 1606, or thereby: Which coming to be advised, it was alleged for Raploch, That this probation could not take off the benefit of prescription:—*1mo.* Because it was not positive, bearing only “to be such a year or thereby;” and, in a matter so ancient, where the question was only of the date, the oaths of old doating men could not make a sufficient probation, much less could it take off the adminicles for astructing the seasine, *viz.* the wadset right granted by the son, and mentioning both the seasine and precept whereunto Auchtifardel himself had taken right; and the notary's protocol, bearing, “this and many other seasines set down by their dates orderly, both before and after this seasine, and all before the year 1606. *2do.* This ground of improbation is but indirect, and not on a necessary consequence; for, if the superior gave a precept of *clare constat* to the son, as heir to the father, and seasine was taken thereupon,—albeit the father had been alive, so that it was the superior's error to suppose him dead,—the precept and seasine would be true, though erroneous and invalid, and 40 years' possession would valid them by prescription; so that, *in dubio*, error is rather to be presumed than falsehood. The Lords sustained the seasine as a true seasine, perfected by prescription, and adminiculated as aforesaid, notwithstanding of the probation in the contrary.

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1673. November 7. JOHN THOMSON *against* ROBERT ROSS.

JOHN Thomson being infeft, by Provost Mains, in an annualrent of £24 out of certain lands of his, pursues poiding of the ground. Compears Mr Robert Ross, and produceth a public infeftment of property of the same land from Provost Mains; and craved preference, because the infeftment of annualrent was base. The annualrenter replied upon possession, by the heritors' payment of the annualrent before the public infeftment; and, for proving thereof, adduced certain witnesses, who proved certain bolls of victual were delivered by Provost Mains