

1680. *February 13.* FAIRY *against* KER.

IN a cause betwixt Fairy and Ker, the Lords declared they would hear this point, in their own presence, Whether one who robbed a horse in the late rebellion 1679, be secure by the act of indemnity from restitution, I think, if he were pursued as a thief criminally for his life, that Act would defend him; but it seems not reason, that, only being convened *rei vindicatione* either for restitution or *ad damnum et interesse* for the price, &c. that he should go free; for the king only pardoned *vindicta et interesse publicum*; but not *interesse privatum*, as was found in William Cockburn's case, *supra*. [Historical volume, 20th September 1679.]

Yet it was ALLEGED, the king, in some cases after a war, (but I think this is only to be understood in a foreign, not in a civil war,) may remit, *ob bonum publicum*, private men's interests: *2do*, Having pardoned the rebellion, he consequently forgives all the lesser crimes as accessory thereto; and stealing of horses was but a part of the rebellion, which had *tractum temporis*, and was only done in order thereto.

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1680. *February 13.* MARY BUCHANAN *against* The LAIRD of BUCHANAN'S HEIRS.

MARY Buchanan craves adjudication of her father the Laird of Buchanan's lands, upon a bond of provision for 20,000 merks.

ALLEGED,—The bond is conditional, if she married with her father's consent, and failing of him, with consent of such friends as he substituted: but *ita est* she had married, without his consent, Stewart of Ardvulloch, whose predecessors were at feud with their family. ANSWERED,—*1mo*, The bond *quoad* L.10,000 must be valid, because, by her mother's contract of marriage, the daughter was provided to as much. *2do*, The bond as to the other 5000 merks must subsist, because *conditiones appositæ ad restringendum matrimonii libertatem* are *inutiles* and rejected. (See Swinburn, and Godolphin, upon last wills and testaments.) And her father was determined to marry her to George Grant, (to whom he had disposed his estate, and passed by his own relations;) and she could not love him. REPLIED,—Conditions prohibiting marriage simply are indeed reprobated, or if they run only to marry one man; but not if they be conceived *ne Titio vel Sæio nūcat*; see Craig *p.* 161, *de Conditionibus matrimonio apposis*; and to say, you shall not marry without the father's consent, is such an honest condition, that, though it were not adjected, it is inherent both by the laws of God and man: and, *esto* she was not obliged to follow her father's advice, she was bound, at least, to have asked it. DUPLIED,—He was of a weak judgment, and not very right, and so it was needless to ask counsel from him. TRIPLIED, Then she was obliged to have asked the substitute's consent, the father being *quasi civiliter mortuus*. *Vide Perez, ad tit. C. de indicta Viduitate.*

The Lords found, she ought not to have the 5000 merks, because she did not perform the conditions, and ask her father's consent; which they found

she was at least obliged to do, since it is possible she might have persuaded her father to consent; unless she will prove that he was *non suæ mentis*, or she will condescend upon some other relevant reason why she needed not seek it.

If a father shall give his child a bond for 10,000 merks, with this quality, In case he or she marry without his consent, that then the bond shall be absolutely null; it is thought this is an unlawful quality and condition: but if it bear, that he restricts the 10,000 merks to 5000 merks, in case of their marriage without his consent, the bond in that case will only be sustained for the 5000 merks; for that doth not absolutely impede their marriage, nor render them destitute of an aliment.

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1680. *February 13.* The REVEREND JOHN BIRNY *against* The HERITORS of CARLAVEROCK.

MR John Birny, minister at Carloverock, amongst other vicarage-teinds, craves likewise the teind of a weaver's loom, in respect of the custom in that parish of paying teind *ex isto textrinæ artificio*; as also, he craved the vicarage of the salt gained at the sea-side, made and cast up by the sun; *nam decimæ minores sunt locales*.

The Lords found these due, in respect of the probation of the forty years' possession by him and his predecessors, ministers at that church, though he was competently provided without this. See *21st June 1649, Charles Lumsden, Minister at Duddingston*, claiming the teind of tobacco which once grew there: as also, for thir unusual teinds, elegant decisions in Basnage's Comment. on the reformed Customs of Normandy, p. 22.

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1680. *February 13.* WILLIAM LOCKHART *against* CROMWELL LOCKHART of LEE.

In the cause, William Lockhart against Cromwell Lockhart of Lee, a declinator was given in against Lord Castlehill, his uncle; as also, because it was *in causa tangente famam patris*: yet the Lords rejected the declinator.

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1680. *February 13.* ANENT THE SEALING OF SIGNATURES.

In a competition betwixt two base infetments confirmed, the one craves preference to the other, because, though both their signatures were presented and past in one day, yet his was sealed three or four days before the other. This was taken to interlocutor by Castlehill. But I think the date of the passing the signatures is the rule of preference, or the coming in *pari passu*; and not the appending the seal, though it should be delayed for several months.

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