

which holds only in case there be a competition between rights and diligences, where they are preferred according to their dates; or where a writ is antedated to evite the reason of reduction *super lecto aegritudinis*, and the like.

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LI.—ANENT the EXECUTORS of LIFERENTERS.

THAT liferenters and their executors may have right to the half year preceding Whitsunday or Martinmas, it is required that they live till these term-days. But it is not well agreed upon, whether they must outlive twelve o'clock of that day, or two o'clock in the afternoon, or twelve o'clock at night after Whitsunday or Martinmas. For ministers' stipends, the terms are Whitsunday and Michaelmas, by 13th Act, Parl. 1672. *Vide* 31st July 1679; and Stair, *tit.* 30, § 54, where he shows that it was interpreted Martinmas day in the afternoon.

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1680. *June 4.* HOME of WEDDERBURN *against* GEORGE PARK of FOULFUIRDLEYS.

GEORGE Park of Foulfuidleys holds his lands feu of Home of Wedderburn, under this irritant clause, that, *sub pena amissionis feudi*, he shall ride and wait upon his superior whenever he shall be required to attend him; and this clause is in the charters of the most part of Wedderburn's vassals. And, upon a debate betwixt him and them in 1638, the Lords found, if Wedderburn called them to attend him in his own private concerns, then it was upon his charges; but if it was on any public concern of the kingdom, then their attendance in that case behoved to be upon their own proper expenses; yea it bore, when he was bound to entertain them, he might set them down at the table, and give them meat with his servants; though Home of Ninewalls, and some other good gentlemen, hold of him by this tenor. It may be doubted if they may perform these servile parts by a substitute; but it is certain, where they find the terms dishonourable, *licet iis refutare feudum*, and abandon it to the superior.

In June 1679, when the heritors were called to the West against the rebels, Wedderburn required Foulfuidleys and other vassals to attend him, conform to the *reddendo* of their charters; Foulfuidleys went indeed to the host with the heritors, but did not attend his superior; whereupon he convenes him in his own baron court, (for by their rights they are liable to answer to his head courts if cited, and *curia domini et pares curiæ* are most competent, especially to judge on feudal prestations and services;) and fined him in 100 pounds Scots. Foulfuidleys suspends, *1mo*, That he was not lawfully cited, being only cited on the ground of the lands, and he dwelt *alibi*. *2do*, He had lands holden of the king; and so, being called forth by his proclamation, he was obliged *obedire domino antiquiori* in a competition; as is decided in all other casualties.

ANSWERED, to the 1st,—The superior was bound to know no other dwelling but the land he had given him; likewise he had labouring there, in his own hands, and so it might soon come to his knowledge. To the 2d,—The king's command and Wedderburn's were *ad idem*, and it detracted nothing from the

king's service that the suspender rode in his superior's company and retinue; and he ought not to be permitted to contemn his superior.

This debate being reported, the Lords found he was obliged to have attended his superior, and that in doing of it he likewise attended the king; and there was no interfering or incompatibility of duty or commands, but both tended *ad eundem finem et effectum*; therefore they repelled the reasons of suspension: but they retrenched and modified the fine to 50 pounds Scots. *Vol. I. Page 100.*

1680. *June 4.* HOPE of CRAIGHALL *against* ERSKINE of OTTERSTONE.

HOPE of Craighall pursues Erskine of Otterstone, his vassal, for non-entry. ALLEGED,—Absolvitor, because he is infest on a precept of *clare constat*. REPLIED,—The precept is null, for his act of curatory appoints three to be a quorum; and it is only subscribed by one of them, *viz.* Mr Archibald Hope. DUPLIED,—That is *nullitas facti*, and so only receivable in a reduction. *2do*, Offers to prove, by production of seven or eight several evidents, that Mr Archibald acted as sole curator; which is sufficient warrant to assoilyie him from an odious non-entry.—This seemed relevant, but it was elided by this TRIPLY,—They offered to prove that the precept was never delivered to him, but *viis et modis* unwarrantably got up from one in whose hands it was conditionally consigned, and that without performance of the condition. This triply was sustained. *Vol. I. Page 100.*

1680. *June 10.*

ONE pursues an executor for a debt, and refers it to his oath, that the defunct to whom he is confirmed, acknowledged it as a true debt upon his death-bed. ANSWERED,—*Non relevat* unless the executor had then, or since, promised to pay it. REPLIED,—It being within 100 pounds Scots, it ought at least to have the force of a verbal and nuncupative legacy. DUPLIED,—Verbal legacies are not sustained in our law where there is a written testament; because then it is presumed that *testator totam suam voluntatem in scriptis redegit*, and that he intended not *partim testatus et partim intestatus decedere*. But these nuncupative legacies were only effectual where they were left by one who made no written will and testament.

The Lords, before answer, ordained the executrix to depone; and so waved to decide the relevancy. *Vol. I. Page 101.*

1677 and 1680. PATRICK REID *against* SIR JAMES STEWART.

1677. *June 7.*—THIS day the Lords advised Mr Patrick Reid's process against Sir James Stewart; wherein they found,—by the unsubscribed scrolls of account given in by Andrew Balfour, where the balance was only £47