

1683. *March.* SIR JOHN FOULIS of REVILSTANE *against* SIR PATRICK NISBET of DEAN.

A MUIR, by decret-arbitral, being decerned to belong, both as to property and commonty, to two in common; one of the parties raised a process *de commune dividendo*, seeing *communio parit discordias*; and craved the encouragement of the Act of Parliament anent inclosing, in respect he designed to inclose his part. Answered, This were a contravention of the decret-arbitral decerning the lands to be possessed in common; and, *in re communi, potior est conditio negantis*. The Lords, before answer, appointed a visitation of the ground, if it lay proper for inclosing, in respect that was controverted.

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1683. *November.* GIBSON *against* GORDON.

AN apparent heir found liable as behaving, for entering to possess lands, in the possession whereof his predecessor died,—albeit these lands were appraised, and the legal expired before the predecessor's death,—unless he had a right or tolerance from the appriser.

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1683. *November.* PORTERFIELD of DOUCHAL *against* AUCHINBRECK.

THIS passive title was sustained against an apparent heir, that he continued his predecessor's possession of some lands, wherein he died infert; and found probable by the apparent heir's oath; albeit it was alleged, that he could not depone concerning the defunct's infertment, that required solemnities he might be ignorant of. But the Lords declared, that, if the apparent heir denied the allegiance upon oath, the pursuer could not use any other probation of that passive title.

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1683. *November.* ALEXANDER CHAPLAIN, Writer to the Signet, *against*

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AN arrester, whose arrestment bore to have been executed at 12 o'clock in the day, preferred to an assignee whose right was intimated the same day, without expressing the hour when it was done, in respect the intimation was not only presumed to have been made the last hour of the day, but also it was owned to have been made in the afternoon.

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