

1684. *February.* MR THOMAS ALLAN *against* MR HUGH BLAIR.

A BOND of 2000 merks being reduced and improven upon this ground, That one of the witnesses insert deponed, that he subscribed it in a room where the principal was present, (without seeing him subscribe, or hearing him acknowledge that he had subscribed the bond,) upon the other witness's assertion that the principal had subscribed; and the other witness, who was a notary, deponed, that the one half of the subscription was the principal's and the other half his own: the creditor in the bond raised a process for damages against the witnesses. Alleged for the defenders, That such an action is a novelty; and witnesses, before the late Act of Parliament, did usually subscribe *witness*, though they did not see the principal subscribe. Answered for the pursuers, That if such witnesses were not made liable in damages, people's security would be in great danger; for, seeing parties cannot always be present when he, their debtor, subscribes, the creditor rests upon the faith of the witnesses, as to the debtor's subscribing; and they ought not, by their subscribing, to induce the creditor to believe that the bond was true and valid, unless they had seen the debtor subscribe, or that he had acknowledged so much to them when they subscribed; and the late Act of Parliament has considered persons signing *witness* to another's subscription, without seeing the other subscribe, as a fault so great, and of so dangerous consequence, that it hath made it *species falsi*. The Lords, *ne-mine contradicente*, found the witnesses liable, conjunctly and severally, to the pursuer's damage, effeiring to the principal sum and annual-rent which he would have had by the bond if rightly witnessed.—*February* 1684. Which decision was thereafter adhered to by a new interlocutor. The like will follow, if notaries subscribing deny the party's warrant.—*Castlehill's Pratt. tit. Improbation and Reduction, No. 92.*

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1684. *February.* SIR PATRICK HUME *against* HUME of LINTHILL, &c.

SIR Patrick Hume, claiming right to fix a dam-head upon a piece of land belonging to Linthill and others, in community, as prescribed by the possession of those persons who pretended [right] to the property of a mill belonging to the pursuer;—Alleged for the defender, The pursuer cannot found upon the possession of the defender and his authors, by virtue of rights reduced by the pursuer, seeing he derives no right from them, but from others having better right: and whatever might be pretended for the pursuer's right, to make use of the defender's and his author's possession, in order to prescribe against third parties, that cannot be obtruded in prejudice of the defender's rights of other lands, seeing he and his authors cannot be said to have been negligent; which is the reason for prescription. Answered, Though the distinction may hold in personal servitudes, yet real servitudes, *quæ acquiruntur fundo*, accresce and pertain to those having right to the land. Now the servitude in question is a real one: and as, if the defender and his authors had built the mill upon the land, it would have belonged to the pursuer; so the right to the dam must belong to him, whether constituted

by persons having right to grant the servitude, or by prescription. Replied, *In-ædificatum cedit solo*, upon a special ground of law, which cannot be extended in this case to what relates to other men's lands. 2. Prescription was interrupted by a declarator for demolishing the pursuer's dam, raised at the instance of the defender's authors, who were heritors of the superior mill, and of the land in which the dam-head was craved to be fixed. Duplied, The citation not being renewed within seven years, it is prescribed by the late Act of Parliament *quoad* the effect of interruption. 2. The declarator did not conclude that the dam should be simply demolished, but to the effect it might not occasion the superior mill to stand a-back-water; and the pursuer is content to be so regulated. Triplied, The late Act of Parliament concerns only interruptions by citation posterior thereto, and not interruption by citation anterior to the act; for, had such an extension been, it would have been expressed, as was done in the preceding Act about arrestments; especially considering, that, by the former law, there was a *jus quæsitum* to the party. And laws are not always to be extended upon parity of reason; nor did the Lords of Session find a year's duty due to a superior by an adjudger, though the Act of Parliament subjected apprisers to such a duty, and such an extension of the law had been rational. 2. Albeit the declarator mention expressly, in the conclusion, to be free of the inconvenience of standing a-back-water, yet it imports a reluctancy; and no acquiescence ought to be sufficient to interrupt as to all other effects: besides, interruption being favourable for maintaining of rights, and taking off negligence, any indication should suffice. The Lords found, That citations before the late Act of Parliament needed not to be renewed within seven years; but that the declarator was not a simple interruption, but only to the effect that the defender's superior mill might not stand a-back-water.

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1684. *March.* MR DAVID HUME *against* HUME of CROSSRIG.

A COMPRISER having called an apparent heir in a declarator of expiring of the reversion, the defender alleged, That the apprising was satisfied by a sale of part of the lands. Answered for the pursuer, That the defender had no interest to propone such an allegiance, without being served heir or infest. Replied for the defender, That he, being called as a defender, and not pursuing, had good interest to allege that the pursuer's right was extinct and satisfied. The Lords sustained the reply.

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1684. *March.* MR THOMAS RIGG *against* SIR WILLIAM PRIMROSE.

IN a competition betwixt an assignee to a debt due by the Lord Roxburgh to the Laird of Alva, and one who had arrested the same;—Alleged for the assignee, That he had done diligence against Roxburgh's heir; whereas the arrester had been *in mora*, and but lately raised his summons of forthcoming. An-