

1649. *June 26.* The VISCOUNT of DUDHOPE *against* COCKBURN.

IN the suspension raised by the Viscount of Dudhope against ——— Cockburne, relict of umquhile David Scrimgear, his uncle, the reason, upon the question of paying 8000 merks, when other right of tocher should have been laid down, did not militate; because the charger offered to show that tocher employed; and, because the other right forenent it was also employed, did not charge for the same; but insisted for employing 22,000 merks, conditioned, in the former part of the contract, by the suspender his goodsir to the said umquhile David, and the heirs to be procreated betwixt him and the said ——— Cockburn, charger. Whereunto was opposed, a reason of compensation grounded upon a bond paid by the suspender his goodsir, for the said umquhile David, his son, as cautioner therein. Whereunto it was answered by the charger, That the payment of the said bond cannot compensate; the suspender his goodsir having paid that sum long before the time of contracting the said marriage; and he, providing his second son that was to be honourably matched, and the heirs of the marriage, to a sufficient stock, did, as it were, *tacite* discharge the former debt; *quasi nemo donet, nisi debito prius in rationem deducto*, chiefly where the father contracts for his son with an honourable party.—*Vide l. 26, procula ff. de presumpt. et ibi D. D.*—for, even back-bonds, given by bairns to their parents before the contract, or betwixt the contract and the marriage, are not fair nor honest; although the husband, induring the marriage, if he will debauch, may spend all that is provided for their children; yea, for the wife also, if she should condescend thereto, even in matter of heritage, let be money. Yet, if a stranger had been made assignee to this bond so paid, he might pursue the heirs of the marriage for payment of the same; and albeit the heir or executor representing the defunct, could scarcely make it a valid debt against the heirs of the marriage, (suppose, for the upholding of an old house,) the heirs being but lasses, and having, in that provision, more than competency, yet a lawful creditor might seem to have more probable reason of action against the said heirs of the marriage, for payment of their father's debt. But nothing can be well sustained for the behoof of the said goodsir contractor. Annæus Robertus his pleidoier are cited anent the honesty of parties in contracting of marriage.

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1649. *June 27.* HAMILTOUNE *against* STEWART.

IN the cause of exhibition pursued by Hamiltoune against Stewart, the disposition being produced, the pursuer alleged that there was a blank in it wrongously filled up by the defender in her own favour, *quasi legatum sibi adscriptisset*; and it was urged, that she should condescend on the writs. After long dispute, her procurator alleged that such a dispute could not come *in hoc ordine*; for if he would be absent after that the writ is exhibited, the Lords could discern no farther, but conform to the conclusion of the summons for delivery. And it was so found by the Lords. The pursuer protested, That his taking up of the writ should be no homologation of the same; but that he might be heard to chal-

lenge it for the blank filling, as accords of the law, in respect that it condescends not on the writer and filler up, which is a nullity by the Act of Parliament. The which the Lords admitted.

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1649. *June 27.* The LAIRD of BRUNTOUNE'S OY *against* The LAIRD.

IN the action for aliment at the oy his instance against Laird of Bruntoune, —it was excepted, That, although the oy was apparent heir to his father, who had died in fee, yet the Act of Parliament is only against wardatours, and drawn, by interpretation, against lady liferenters; and not where the goodsire, by contract of marriage, hath given a fee of all his lands to his son, with reservation of his liferent of so much; which could not be diminished by the son, although he had a numerous family, let be by the oy, whom he is not obliged to entertain. The pursuer alleged, That the goodsire got a great tocher, and the lady liferenter's mein portion was as it were bought. The Lords would hear it *in præsentia*.

This would be helped, either by an Act of Parliament, or a clause in the matrimonial contract, that women entertain the children till they may do for themselves.

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1649. *June 27 and 28.* ————— *against* WIDOW FYFE.

IN the process for heirship, the widow Fyfe had gotten two several commissions before, for giving her oath at Dundie, but, being defender, had neglected the same. Therefore, the Lords would give no farther commission; but ordained her to come and depone here specially, seeing there was no testimonial of infirmity.

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1649. *June 28.* GUTHERIE *against* The LAIRD of FENTRIE.

IN the exhibition pursued by Gutherie against the Laird of Fentrie, of a bond consigned in his hand, Major Scrimgeour, to whom it was made, called for his interest, excepts, that the bond was delivered to him and registrate, and so could not be exhibited. Yet the Lords would take then the Laird of Fentrie his oath anent the alleged condition whereupon the bond was put in his hand, he being *depositarius*.

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1649. *June 28.* HENRY LYLE *against* ROGER MOWAT, &c.

IN the action at the instance of Henry Lyle, for a legacy left to him by his
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