

1670. *November 20.* CAPTAIN RUTHVEN and his SPOUSE *against* The Viscount of OXFORD, GEORGE and MISTRESS CATHARINE MACGILLS.

CAPTAIN Ruthven and his spouse pursuing the Viscount, as executor to his father, for her part of the moveables belonging to her as one of the bairns, besides the heir;—It was ALLEGED for the defender, That there ought to be deduction of the portion natural and bairns' part, which did belong to Mrs Marie, and now did belong to the defender, as her executor.

To this it was REPLIED, That the said Mrs Mary had a bond of provision, from her father, in full satisfaction of all bairns' part of gear and portion natural, which could fall to her by her father's decease; and thereby was secluded from her part of the moveables.

It was DUPLIED for the defender, That, notwithstanding the said bond of provision, her portion natural was due; because the defunct, in her own time, had the benefit of election, either to accept of the bond, or to come in as a bairn with the rest of her brethren and sisters; which benefit did now accrue to the defender her executor; likeas they did now make use thereof.

The Lords did repel the defence and duply; because that, the time of the defunct's decease, the provision contained in the bond was greater than the portion natural that would have fallen; in which case she could not have the benefit of the election, unless she had conferred her provision with the rest of the bairns: neither could the Viscount, as one of her executors, now crave the same; because the bond of provision, being a debt due by him as heir, he could not disclaim the same to be free of that debt, and crave that her portion-natural might be deduced, in prejudice of Captain Ruthven and his wife, who, being of another marriage, could be none of her executors. And for the said George and Mrs Margaret, they could not crave the same, it being to their prejudice and loss, by deducing so much off the whole bairns' part; so that it appeared to be a mere collusion betwixt them and the Viscount their brother, who was heir, to free him of the bond of provision, to which he was liable; and to diminish the said Mrs Catharine's portion.

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1671. *January 18.* WILLIAM FERGUSON *against* GEORGE LINK.

THERE being a copartnery betwixt the deceased John Rolling and George Link, there was a parcel of goods belonging to them sold to one Andrew Melvin, for which he gave bond to the said John, and George, and their heirs, which was registered; and the principal being in the custody of Link, he did pursue and recover payment of Melvin, of his equal half at Elsmoore. Ferguson, being assignee made by Rolling's wife, who was executrix-creditor of her husband, did pursue the said Linke for exhibition of the principal bond, and for the equal half of the money he had received, in respect the whole sum contained in the bond was made due to them both without division: Likeas it was granted as the price of goods belonging to them in copartnery.

The Lords did, notwithstanding, assoilyie from payment of the half of the sum

received; because the bond, being granted to them *conjunctim*, did belong equally to them; and any one might pursue for his own half: And albeit it was for the price of goods of the copartnery, yet the bond being taken and received, as said is, was not to be regulated as the goods themselves would have been, wherein every one of the copartners would have had an equal interest, as to all particulars; whereas the bond being conceived, as said is, ought to give right according to all bonds of that nature; and so gave right to each of the creditors to the half which they might lawfully uplift.

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1671. *January 26.* FERGUSON *against* The PARISHIONERS of KINCARTH.

ALEXANDER Ferguson, as one of the prebends of the Chapel-Royal, having pursued the heritors of the Parish of Kincarth, for their teinds, for bygones and in time coming;—Compearance was made for the parson of Rothesay, whereupon it was ALLEGED for him and the parishioners, That they ought to be assoi-lyied, because he had a presentation to the said kirk and parsonage, bearing the teinds of Kincarth, and was in possession by the space of 40 years.

It was REPLIED, That the pursuer, being a prebend of the Chapel-Royal, to which the teinds of the said parish were annexed, ought to be preferred to the said parson of Rothesay, whose right was only a naked presentation clad with possession.

The Lords, as to all bygones, did assoi-lyie the Parishioners who had made payment; but did decern for all years since the citation: the pursuer always instructing by the books of assumption, or an extract forth of the same, that the kirk of Kincarth is one of the prebend kirks of the Chapel-Royal.

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1671. *January 27.* The EARL of DUMFRIES *against* ALEXANDER BURNET and HAY his Mother.

THE Earl of Dumfries's father being debtor to Andrew Smith, by bond, in the sum of £4600; whereupon inhibition was served, before that Dumfries did dispo- ne the Lordship of Sanquhar to the Earl of Queensberry, in the year 1638: by a subscribed condescendence, Queensberry was to retain as much of the price of the lands as that sum did amount to, until the inhibition should have been paid; after which, *in anno 1643*, Dumfries, having got a discharge from Andrew Smith, the creditor, did deliver the same to Mr Alexander Burnet upon a ticket of receipt; whereby he was obliged to registrate the same, and give an extract thereof for purging the inhibition: And, in the year 1669, Dumfries did intent an action against Burnet's heir and executor, for delivery of an extract of the discharge, or payment of his principal sum, and annualrents accordingly.

The Lords did decern, superseding extract until November thereafter; that, in case the defender should recover a discharge from Smith's heirs, or obtain a