

1739. *February 1.* EARL of WIGTOWN and LOCKHART of Carnwath, *against* FEUERS of Biggar and QUOTQUAM.

IN the division of the common muir of Biggar, it being contraverted, Whether certain of the charters produced by the vassals imported a right of property or servitude in the muir? The Lords found, that where lands were disposed, with parts, pertinents, and pendicles, or where they were disposed, with mosses, muirs, commonities, parts and pertinents in general, whereon possession in a common muir had followed for forty years, it did import a right of property; but where the lands were disposed with parts, pendicles, and pertinents, with common pasturage used and wont, though the possession in the muir had for forty years to all intents been the same, as in the former case, it was found to import only a right of servitude in the common muir.

For the rest of this case, see *Morison's Dictionary*, p. 2468.

1739. *February 2.* DANIEL FORBES *against* ALEXANDER INNES.

THE circumstances of this case are stated by C. Home, (*Mor.* p. 712.) It is also noticed by Elchies, (*Pro. Note, No. 1.*) Lord Kilkerran has the following note of the grounds of the decision.

“Feb. 2, 1739. The Lords adhered.

“*Arn.* observed, that such notes are even no otherwise indorsable than as a holograph bond; that is, by a writing on the back, however short, but not by a blank indorsation; and that by the words of the act of Parliament, *Notes of a trading company*, is understood, Notes of a company incorporate by law, as the bank, &c.

“I think the interlocutor right, and that such notes are both compensible, and that arrestment before intimation to the acceptor will be effectual.

“*Nota.* It has been often found that such notes are compensible, *ergo* arrestable, an unanswerable consequence.”

1739. *February 2.* THOMAS BOYES *against* JOHN OGILVIE.

THIS case is reported by Elchies, (*Cautioner, No. 7.*) where the circumstances are stated. Lord Kilkerran's note is as follows:—

“The general point of *jus superveniens accrescit* would *per se* not have been sufficient to support the interlocutor; for notwithstanding of such accretion, as between buyer and seller, yet still the separate right being duly affected by a creditor, would remain with that creditor, in competition with the purchaser, though this was not the subject of any argument at this time, the Lords being all clear

on the second ground, that the creditor is bound to assign all separate securities to the cautioner, not *ex equitate* only, but *de jure*, and that, if he have aliened such securities to a third party, he cannot thereafter be heard to quarrel the validity of such securities which he himself has conveyed."

---

1739. July 6. JOHN CORSBIE *against* JAMES SHIELL.

For the facts of this case, *vide* C. Home's Report, (*C. Home*, p. 200; *Mor.* p. 16842.) Lord Kilkerran's note is as follows:—

"It was suggested by Elchies, upon moving the bill, that in this case there was no writ at all necessary; for a verbal agreement would have had the same effect. But if it is put upon this, the oath does not prove accession to this agreement. It proves no more but that he agreed the lands should be sold to be applied to payment of his debt, but proves no accession to any agreement for quitting any of the subject of his payment."

"July 4, 1739. At advising the petition and answers, it was observed by the Ordinary, that the question did not occur here, whether one's presence at a meeting of creditors, and not opposing the general measures, implied an acquiescence, because the party was not agreed that there was any such meeting; the charger affirming that he was called off the street to sign, as others were, one after another, and that there was no general meeting. He further observed, that he laid no weight upon the quality of the charger's oath; but that he had put his interlocutor upon the abstract point, that a deed null for want of solemnities required by law, could not be supplied, so as to induce the *litterarum obligatio*, by the party's oath, though the oath might prove the debt.

"ELCHIES observed, that deeds labouring under such defects had been found capable of homologation, and therefore might be supplied by oath.

"ARNISTON observed, that that argument would carry the matter too far, if these precedents were to be the rule; for he believed it may have been found, that where a man's subscription was not legally attested by witnesses, homologation might supply the deed, but declared he was not of the opinion of those decisions; but he thought in the case, where it was not of a party's subscription not legally attested, the deed might be homologated, and therefore was in this case suppliable by the party's oath, that he gave warrant to one notar to sign, for that the two notars are only required, *ad majorem evidentiam*, of the party's consent, and not in way of solemnity.

"Upon the vote, the Lords were equally divided, and by the President's casting vote it carried to alter and sustain the deed. Having talked of this matter afterwards with ARNISTON, I found him of opinion, that before the year 1681, even when a party's subscription was not legally attested, the defect might have been supplied by the party's oath, that he signed the deed, but that the same was not suppliable by the party's oath since the act 1681. Now, the signing by notars being no part of the act 1681, he considered all defects in such deeds to be suppliable.