

1780. *January 12.* JAMES HILL *against* THOMAS HOPKIRK and JOHN M'CALL.

## BURGH-ROYAL.

Powers of the Town-Council to inflict fines on Burgesses refusing to accept of offices within the Burgh.

[*Faculty Collection, VIII. 187; Dictionary, 10,995.*]

BRAXFIELD. Magistrates have a discretionary power to oblige burgesses to serve: but here the Magistrates, after the regulation 1748, could not impose a new fine.

COVINGTON. I am not fond of allowing burgesses to buy off, although the practice is such in many boroughs, and even in London.

HAILES. Perhaps it would have been more constitutional to have deprived the defenders of their burgh tickets.

PRESIDENT. The Magistrates have no such power. It would have been hard to have deprived seceders of their burgh-tickets; who, being good subjects, do nevertheless entertain scruples of conscience as to taking certain oaths.

[This does not apply to the defenders, who are not seceders, and have no scruple of conscience to plead; neither does it apply to any seceders, but the anti-burghers: and it remains to prove that such men can be members of a borough community, according to their principles, when contrasted with the regulations of boroughs and the law of the land. *Query, Are those men positively Whigs, or are they not rather negatively not Jacobites?*]

On the 12th January 1780, "The Lords assoilyied, in respect that the defenders had already been fined for councillors, and that the office of Dean of Guild implies that of councillor;" adhering, in substance, to Lord Gardenston's interlocutor.

*Act.* Ilay Campbell. *Alt.* J. Maitland.

1780. *January 14.* GEORGE MANDERSON *against* JAMES ERSKINE.

## BENEFICIUM CEDENDARUM ACTIONUM.

Is a co-debtor entitled to receive assignation of diligence from the creditor for speedily operating relief?

[*Fac. Coll. VIII. 189; Dict. 1386.*]

KAIMES. The creditor ought in equity to assign: it will not hurt him; and it may afford ready execution to the cautioner.

MONBODDO. A cautioner may demand an assignation, both by the Roman law and ours.

GARDENSTON. There are two very old decisions, and an opinion of Mr Erskine, founded on; but still I think that the decisions and the opinion are erroneous. A thing which is *innocuæ utilitatis* to the creditor, and may be useful to the other party, must be done; and it is peevish to oppose it.

ALVA. When a man does no more than pay his own debt, he cannot demand assignation.

PRESIDENT. A creditor is entitled to take his payment, but he must not do it emulously. In the case of the creditors of *Buchan*, it was found that creditors were not obliged to assign.

JUSTICE-CLERK. In the case of bills, it is not understood that the creditor is bound to assign.

BRAXFIELD. The granting of an assignation may not seem a matter of much moment to one who is not conversant in the negotiation of bills; but when L.500 bills pass through a man's hands every day, it would be a great embarrassment to commerce were he bound to assign as many of them as debtors pleased: the very loss of time, and the necessity of giving attendance on such occasions, would be distressing. The granting of assignations was introduced into the law of Scotland, from principles of equity, in the case where the secondary creditor had no right to the subjects without assignation. A creditor has no business to enter into the question, How the co-obligants are bound to each other. If the co-obligant can point out any relief which he may obtain by the assignation, and which he has not at common law, then the creditor must assign *ex equitate*.

PRESIDENT. I shall not dispute the obligation to assign bonds; but, as to bills, it would introduce inexpressible confusion.

[The Lords did not determine the general point, but laid hold on the particular circumstances of the case; and so avoided a vote.]

On the 14th January 1780, "The Lords, in respect that diligence had been done, and a decret obtained, found that the creditor must assign the decret, in order to operate relief;" altering Lord Alva's interlocutor.

*Act.* G. Buchan Hepburn. *Alt.* R. Sinclair.

1780. *January 14.* ANDREW CRANSTON *against* JOSEPH SYMINGTON.

#### WARRANTICE.

Whether a proprietor is bound by a general clause of warrantice to relieve his tenant of a thirlage?

[*Fac. Coll. VIII. 192; Dict. 16,637.*]

BRAXFIELD. Supposing thirlage to have been constituted, I think that the