

1671. *February 23.* The LAIRD of SMETON and BEINSTON *against* ALEXANDER SMITH, Tenant in Waughton.

THIS was a count and reckoning, in which the creditors pressing that Alexander might count to them for the years 1658, 1659, and 1660, which were after the decret of preference, and in whose prejudice, without taking notice to their rights as he should have done, he made payment of his duty these years to the Laird of Waughton. Against this it was ALLEGED,—That we being in an act of count and reckoning it behoved to be the rule by which we walked; but *ita est*, my Lord Whytkirk is nominated auditor of the counts for the year 1661 and thereafter, and therefore the defender cannot count *hoc loco* for these years. My Lord Whytkirk found he should not count for the years 1658, &c. here.

Then he craved we might be reponed against the decret 1662, wherein he was holden as confest for 30 chalders of victual. After some debate they were content to repone him to his oath.

Then ALLEGED,—That he behoved to count to them all along conform to the tack-duty contained in the tack set him by Waughton in the year 1655, and not conform to the duty in the tack set in 1666; because beside that the Laird of Waughton had no power to set any tacks, being denuded by so many real rights and apprisings, there is likewise a great alteration in the qualities of the victual to the creditor's prejudice, 60 bolls of wheat being converted into bear, and bear into peas, &c. ANSWERED,—The laird was still heritor, and might well renew the tack, especially considering, that any alteration made in the qualities of the victual noways diminished the first tack-duty, because the bear the several years by-past has given as great a price as the wheat. We got the Lords' answer upon this, who found he must count, conform to the tack-duty contained in the last tack for all years since the same, unless the pursuers would offer them to prove that there was collusion betwixt the heritor and tenant, or that the second tack is in open diminution of the rental, or that the mains could have been then set to a tenant who would have paid more than that tack-duty.

Then I ALLEGED,—That he behoved to count, conform to the duty contained in the last tack, not only for the years subsequent to the last tack, but for the years preceding it, ever since his renunciation of the room; because in the tack 1655, there is a clause empowering the tenant to quit the tack in case he find himself too great a loser, but *ita est* in 1661 he renounced; and in 1664 renounced again; upon which renunciations, and in contemplation thereof, this new tack was set to him by the mediation of my Lord Whytkirk and Mr. John Drummond, and therefore this tack must be drawn back to the first renunciation as its proper cause, and must take effect from that time. This my Lord repelled, because before the entry, by virtue of this new tack, the old one, which was set but for eleven years, was expired. Then the creditors contended that Alexander behoved to count to them for the Crawlock meadow and the sheill park; though it be not within any of his tacks, yet being a part of the lands wherein they stand infest, he must count to them for such years as he possessed it; and the time and years of his possession they refer to his oath.

To this it was ANSWERED,—That he not possessing these places the time of the obtaining the decret, 1662, (which is the ground whereon this count and

reckoning proceeds,) he cannot count for them here in this place. *2do*, The creditors have no right to them, who stand only infest in the maynes, and thir were never a part of the maynes. We had the Lords' answer on this also, and they found he could not count for them here; that which moved the Lords was the favourableness of the cause, being a tenant who had *bona fide* paid it already, though not warrantably, and to the right person, for double payment is most odious in law.

Then it was controverted anent the prices of victual these years for which he was to count; and my Lord declared he must count conform to the middle fiars of Hadington, and not conform to the highest, as Smeton pressed, though for some of it he might have got a greater price. See my informations of this cause.

*Advocates' MS. No. 150, folio 92.*

1671. *February 23.* His PARISHIONERS *against* REV. ARCHIBALD MACKINLA.

ONE Mr. Archibald Mackinla being pursued by his parishioners upon the act of Parliament, ordaining the parish to make the minister's manse sufficient to him at his entry, but appointing the incumbent to keep it up on his own charges and to leave it in as good condition as when he found it, and in case he neglect, ordaining action to be sustained against him, his heirs or executors, for refunding the damage, which, upon visitation, it shall be found to have received during his incumbency; Parl. 1612, cap. 8, *ibique* Paponius; act 20, *anno* 1663: but they subsumed he had deteriorated the said manse in the sum of 300 merks, which was made appear by cognition taken of it both at his entry and at his departure, finding it damnified in the said sum: *item* they pursued him both to pay them this 300 merks, as also to restore them their mortcloth which he had taken away with him at his departure. ANSWERED,—They were only disaffected persons, he being a loyal conformist minister.

The Lord Advocate found the summons relevant, only in case they succumbed in the probation that they deserved a very sharp censure.

*Advocates' MS. No. 151, folio 92.*

1671. *February 23.* The SCHOOLMASTER of Drone *against* some HERITORS in Dumbarrie.

THE Schoolmaster of Drone pursuing some heritors in Dumbarrie to pay their proportion of the stipend contained in the stent roll; ALLEGED,—They paid that proportion he charged for to another schoolmaster, and so could not also pay to him. ANSWERED,—That by acts of Presbytery they were disjoined from that place to which they alleged they paid that stipend, and annexed to Drone. REPLIED,—This disjunction and dememberation is only *quoad officium* but not *quoad*