

1672. November 8. JEREMY SPENCE.

THIS day the Lords, having received information that Jeremy Spence, servitor to the Lord Newbaith, had forged his master's hand to a bill of suspension, at the instance of ———, captain of a privateer, against a stranger; and he having been examined thereupon, and confessed the same;—the Lords, with open doors, having called in the whole advocates, found the same to be a forgery, and declared the said Jeremy infamous, and incapable of any office depending upon the Lords; and remitted him to the Justices, and continued him in prison; and ordained the suspension to be recalled, and the same, with the bill, to be cancelled, which was done accordingly.

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1672. November 15. MAJOR BIGGAR *against* The LAIRD of NIDDRIE.

MAJOR Biggar, having charged Niddrie for payment of a bond, wherein Niddrie was cautioner for Keith of Edmiston to the Laird of Wolmet, for 7000 merks; given, upon arbitrament, for the mutilation of Wolmet's hand; and bearing a provision, that, before payment, Wolmet should grant a letter of slains, and procure a remission to him;—which being now procured, and Major Biggar having right to the bond, charges Niddrie; who suspends; and alleges, He ought to have retention of a part of the annualrent, conform to the Acts of Parliament 1646, 1647, and 1648. It was answered, That some of these Acts did bear no retention, unless the annualrent had been paid within the year. *2do.* That all these Parliaments were rescinded. It was replied, That the not-payment of the annualrent, within the year, could only be understood when the annualrent was due to be paid in these years; but this being a conditional obligation, that payment should be made upon delivery of a letter of slains, and a remission, which not being obtained, nor offered within these years, the debtors were not *in mora*; and, though these acts be annulled, yet there is a *salvo* of the rights of private parties arising thereby. It was duplied, That there was no distinction of obligations in the acts, whether pure or conditional, and that the condition did only affect the principal sum, and not the annualrents. The Lords found, That the condition affected both; and that retention was due, seeing the debtor was not *in mora*, in payment of the annualrent.

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1672. November 15. MASTER of FORRESTER *against* The EARL of CALLANDER.

GENERAL Ruthvin, late Earl of Bramford, being forefault in the time of the late troubles, was, by a special Act of Parliament, *in anno* 1662, restored; which act was superseded to be extracted, while, by order of Parliament 1667, it was ordered to be extracted. Whereupon the Lady Forrester, who had right by disposition from her father, and the Lord Forrester her husband, obtained

decreet against the Earl of Callander and others, for re-payment of certain sums upon wadset, belonging to the said Earl of Bramford. And, upon a petition by the Lord and Lady Forrester to the Parliament, in July 1672, complaining, that, by a contract with the Lady Dowager of Bramford, the Parliament's intention, for preserving the Earl of Bramford's memory, would be frustrated, after citation and hearing of the Countess; the Parliament did declare, that their meaning, by the restitution of the Earl of Bramford, was, that his estate should be established in the person of Edward Master of Forrester, procreated betwixt Bramford's eldest daughter and the Lord Forrester, he carrying the name of Ruthvin, reserving to his father and mother the half of the annualrent thereof during their life; and ordained all decreets obtained, or to be obtained for that estate, to be in his name; who thereupon petitioned the Lords, that the decreet against Callander, not yet extracted, might be in his name. Compearance was made for the creditors of the Earl of Bramford and Lord Forrester, who alleged, That the said Act of Parliament could have no effect against them, whose right was preserved by the act *salvo jure*; for, some of the creditors having arrested, and some having gotten assignations intimated from the Lord Forrester, and all of them having right to affect Bramford's estate, as being established in the person of his daughter and husband, by the Act of Restitution, extracted *in anno* 1667, it can neither consist with the justice nor intention of the Parliament, by their late act, to take away the rights of the creditors, but only to alter the *fiar*, which must be, as the matter stood, the time of the last act; for, if before, if the Lord Forrester and the Lady had disposed, or uplifted the sums, and discharged the same, this supervenient Act of Parliament could never infringe the same; and yet, by an extensive interpretation, it would. It is answered, That, whatever might have been said before the making of the Act of Parliament, yet, it now being made, it hath the force of a law, and cannot be restricted by any other authority than the Parliament. Neither doth it fall within the act, *salvo jure*, which relates only to ratifications and such rights as pass of course; but where the Parliament, of certain knowledge, doth enact any thing, the same can be nowhere judged but by the Parliament. And there is no difference whether the parties concerned be called or not; as was decided by the Lords in several cases observed by Dury, as in the case of the Earl of Rothes, John Stuart of Coldinghame, and several others; and especially in this case, where the Act of Parliament is not a sentence or determination principally concerning the rights of private parties, but is an act of restitution of a person unwarrantably defaulted; which, though it proceeds upon the grounds of justice, and not merely of favour, yet it cannot be controverted but that,—in the act of restitution, if, at first, the fee had been established in the person of Bramford's grand-child, carrying his name, (but that) it would have been valid, and Forrester's creditors could not have called it in question. And this act being an act explanatory of the former, bearing expressly, that such was the Parliament's meaning, and that it should be in the same case as if it had been so conceived at first; the creditors' collateral interest ceaseth. And if the friends of Bramford had craved it so to be declared, they needed only call the Lady Dowager, the Lady Forrester, and her husband, and not the creditors, whose right would fall in consequence; and though the matter had been represented to the Parliament, they neither ought nor would allowed Bramford's estate nor memory to be absorbed by Forrester's debt; and, for Bramford's own debt, a restitution to his

estate in general will never exclude it. It was answered, That not only the act *salvo jure*, which was the greatest security of the people, did preserve the interest of all the creditors, but likewise the Lords, by a general Act of Parliament, are ordained to decide according to the general laws, and not by acts imputed by private parties, to the prejudice of others who were not called nor heard; but, above all question, the Lords are interpreters of Acts of Parliament, and may and ought to interpret this, so as to convey the fee to the grand-child, as it was the time of this act, and so with the burden of the debt. It was replied, That there was no real burden affecting the estate, but, at most, arrestments, upon which nothing had followed, and an assignation, in place of a cautioner in a suspension. And here the Parliament having expressly decerned, that this decret against Callander should be in the person of the grand-child, there neither being title nor process at the creditors' instance produced to crave preference upon,—all that now is in question is, whether the decret should be extracted in the name of the grand-child, conform to the said Act of Parliament. The Lords found, That now there was no more before them but the extracting of the decret, which they ordained to be extracted in the name of Edward the grand-child, conform to the foresaid Act of Parliament.

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1672. November 20. MR PATRICK HUME *against* BROWN.

MR Patrick Hume, as donatar, constitute by Rentoun his father, to the non-entry of the lands of Brownsbank, pursues a declarator of non-entry. It was alleged for Alexander Brown, Absolvitor; because the lands of Brownsbank were holden, of Rentoun or his authors, feu, by William Brown, who wadset the same to Thomas Brown; and, being resigned in his favours, Rentoun would not give him infestment, but only of a ward-tenor. But Alexander Brown, having apprised both from William Brown, who had the right of reversion, and from Thomas Brown, the wadsetter, did charge Rentoun, the superior, to receive him feu, and offered a year's feu-duty; but Rentoun did unjustly suspend upon several grounds, *viz.* That he had right himself to the property, and that he ought to have a full year's rent of the land, being ward; so that the appriser having done diligence, and the superior being in the fault, he must be in the same condition as if the superior had entered him, which would stop the non-entry. It was answered, That the superior was not in the fault; for the wadsetter, being the only proprietor, and holding immediately of the superior, and the appriser having apprised both from him and from the other who had the reversion, he could only charge the superior to receive [him] in place of the wadsetter, who only was his vassal, the former vassal having no more but only the right of reversion; and, unless the wadset had been redeemed, and the appriser, in place of the old vassal, had been re-invested, he could not have made use of the feu-right granted to the old vassal, but only of the ward-right granted to the wadsetter; so that the superior was not in the fault in not receiving the appriser by a feu-right, upon payment of a year's feu-duty. And, albeit the charge was in the time of the usurpation, when wards had no effect as to their casualties, yet