

1692. *November 22.* CATHARINE CHARTERS and her CURATORS *against* RORY M'KENZIE of Prestonhall.

MR. RORY M'KENZIE of Prestonhall being debtor, by bond, to Catharine Charters, he, a few days before Martinmas last, offered the money to herself and her Curators. They refused, because not timeously advertised to provide new hands for lending it out again; and it was not paid, nor offered precisely on Martinmas day.

The Lords found they were bound to take the money, unless the bond bore a clause of requisition; but that they behoved to get the annualrent of it since the term, if it carried to pay annualrent termly, quarterly, monthly, and proportionally. *Vol. I. page 520.*

1692. *November 22.* WEMYSS of Hoody *against* WEMYSS of Nutbank.

THE advocacy raised by Wemyss of Hoody *against* Wemyss of Nutbank, from the steward of St. Andrews, being reported, the Lords sustained the two reasons of advocacy, *1mo*, That he refused or delayed to take the pursuer's oath of calumny on the libel *in principio litis*, though afterwards he did it; seeing every one is bound to swear *quoad lis sibi justa vidit*. Yet the President thought the Judge was not bound to grant it, till some relevant allegiance was proponed.

The *2d* ground was, that the steward refused to give separate interlocutors on the defences, till he heard all they had to say; which, though it be very reasonable in a Judge to have the whole before him, yet here it appeared to be done *ex proposito* to stop and prevent an advocacy, by pronouncing his interlocutor and definitive sentence with one breath, to put him to a suspension to find caution, where he would be straitened because of the greatness of the claim. *Vol. I. page 521.*

1692. *November 9 and 22.* SIR FRANCIS KINLOCH of Gilmerton *against* SCOTT of Bonnyton.

*Nov. 9.*—THE roup of the lands of Scott of Bonnyton, pursued by Sir Francis Kinloch of Gilmerton, being heard *in præsentia*; it was objected, *1mo*, That the act of Parliament 1681 was not observed, seeing Calderclear, one of the six parish churches, was suppressed, and so no more a church. *2do*, That it was not proven he was bankrupt; and that the roup was only sought for a part of his lands, and omitted others; by which means it could never be known whether his lands could pay his debts, unless all his debts and lands were in process and instructed; and that if partial roups were allowed, this inconveniency might follow, that the most valuable part of a man's estate might be culled out, *viz.* some lands near his house, yards, and inclosures, and the rest contiguous omitted, which in conjunction may give sixteen or seventeen years' purchase, and alone without these accommodations would either find no buyer at all, or would not give twelve or thirteen years' purchase.

ANSWERED to the 1st.—They were *in bona fide* to intimate at such churches, as the Lords' act designed them as adjacent, which was the rule. To the 2d, they opposed the act 1681, which allows to sell the whole estate, or any part thereof, providing it be not chosen or picked out *in emulationem*, and to the prejudice of the other creditors; and that it was so found in Tarbet's case, who was allowed to carry on a roup of part of Cromarty's lands.

REPLIED,—The new act of Parliament 1690 alters that, in so far as it mentions "the estate," but repeats not that clause, "of any part of it."

DUPLIED,—*Hoc non agebat* by the last act; and correctory laws must be clear and expressive, else *non præsumitur correctio*.

The Lords allowed them to condescend upon another church in place of that suppressed; and found that no part of the insolvent debtor's estate ought to be omitted, especially if contiguous; and, therefore, allowed them a farther term to execute at that church, and to lead probation of the value of the rest of the estate; and prorogated the roup till these were concluded. But some thought it would be securer for a buyer to renew the hail citations, than to bottom his right upon a controverted act, in a new introduced law or custom. *Vol. I. page 517.*

November 22.—The roup of Bonnyton, mentioned 9th current, being again debated, the Lords found it would be no nullity, in such a process, though the creditor pursuer of it did not libel the whole lands and rights belonging to his bankrupt debtor, providing he did not *de industria* leave out some, and pick out the most saleable parts; and that he was not bound to take notice of the debtor's contraverted rights and pleas, which he might have upon other estates, where he was not in possession; which would force him to search all the registers in the kingdom. But if either the debtor or a co-creditor appeared, and condescended upon omitted lands, in that case the creditor-pursuer of the sale ought to add them to his libel, and lead probation of the rental with the rest of the estate, that the Lords, upon advising their value, might set a rate and price upon the omitted lands as well as the rest. But that this condescendence must be proponed and given *in debito tempore* before the first term for proving the rental, and after that not to be receivable. And, in this case, ordained Gilmerton to prove the value of this land which Bonnyton alleged was omitted; and declared after that was advised, and the *minimum* of the price set thereon, they would issue out a new warrant for intimations at the several parish kirks. And found, they could not have received Bonnyton's allegiance, that he had a farther estate, because he had not proponed it *debito tempore*, had it not been that the intimation was null, one of the parish-churches, *viz.* Caldercleir, being suppressed; which, though it was not nominated as one of the kirks, by the act of the Lords, yet that was on the parties application, and so was *periculo petentis*. *Vol. I. page 521.*

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1692. November 23. LADY SCOTSTOWN and COLQUHON of Tullyquhen, her Trustee, *against* DAVID DRUMMOND of Innermay.

RANKEILOR reported Colquhon of Tullyquhen, and Lady Scotstown *against* Drummond of Innermay, about the reduction of Stewart of Rosyth's disposition