

1692. *December 10.* HERRIS of Magbee *against* CHARTERIS, &c.

IN an action between Herris of Magbee, and Charteris, &c. the Lords found an old infeftment of annualrent, dated in 1614, of five bolls of victual, for a small principal sum, annualrent being then at ten per cent. ought now to be restricted to the current annualrent of six in the hundred; but found bygones before the quarrelling not usury, but *fructus bona fide percepti*. *Vol. I. page 530.*

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1692. *December 10.* JAMES GORDON, Parson of Banchrey, *against* CROOKSHANKS of Banchrey.

IN a spulyie of teinds, pursued by Mr. James Gordon, parson of Banchrey, against Crookshanks of Banchrey, who founded on his infeftments since 1618, bearing *cum decimis inclusis*, and so free of all stipend as long as there are any other teinds in the parish unexhausted: The Lords demurred to find thir teinds of the nature of *decimæ inclusæ*, unless the rentals of the abbacy of Arbroath, whereof they were a part, were produced, to see if they were possessed by that convent for a joint duty, both for stock and teind, or that there were feu-charters bearing *cum decimis inclusis* preceding the act of annexation of Kirklands in 1587, and that were never known to be *a solo separata*. See *Stair, 13th July 1678, Monimusk*. *Vol. I. page 530.*

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1692. *November 18, and December 13.* SIR JOHN CLERK *against* The EARL of ABERDEEN.

*November 18.*—SIR JOHN CLERK of Pennycook against the Earl of Aberdeen, for a house-rent in Edinburgh, from Whitsunday 1682, to Whitsunday 1683.

ALLEGED,—It was prescribed *quoad modum probandi*, not being pursued within three years. The Lords found, by the Act of Parliament 1579, he was only bound to depone if it was yet resting unpaid. *2do*, Alleged, He did not possess it that year, but removed in August 1682, and never took it from the pursuer, but from the Duke of Gordon; and, on his removal, Mr. Thomas Gordon entered. The Lords thought this but a momentary and precarious possession; and yet it being hard that the landlord should lose his mail, they inclined to let him cite Mr. Thomas Gordon's heirs *incidenter* in this process, as they had lately in 1690 done, in Cathcart of Carbiston's pursuit against the Lady Riccarton, wherein Saminton was called *pro interesse*. *Vol. I. page 519.*

*December 13.*—Sir John Clerk against the Earl of Aberdeen, for a house-mail. The Lords had found it prescribed *quoad modum probandi*, not being pursued within three years; as observed, *supra* 18th November last; but the Earl

alleging he needed not depone at all, whether it was resting owing unpaid, because he neither possessed as a tenant to Sir John Clerk, from whom he did not take it, nor as a subtenant to the Duke of Gordon, but was merely a precarious possessor, for a few weeks after the term, and then removed; and any right he possessed by, was by the *tacita relocatio* of the Duke of Gordon; and on his removing, Mr. Thomas Gordon, the Duke's writer, entered, and his possession was the Duke of Gordon's. The Lords found, that any time he possessed could not make him liable, not being warned; and assoilyied Aberdeen. *Vol. I. page 531.*

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1692. *December 13.* LADY ROSYTH *against* DRUMMOND of Innermay.

LADY ROSYTH *against* Drummond of Innermay. The Lords found the restriction the Lady had given of her jointure, of fifteen chalders of victual, to 1200 merks, providing it were punctually paid, at least within thirty days after each term, was not a favour merely personal, but extended also to her son's singular successors, and that they could not pretend ignorance of the hazard of the irritancy; but yet that it did not totally annul and forfeit the benefit in all time coming, but only for that term wherein it was incurred; so that if, by laying the partial discharges together, it appeared 1200 merks was not paid her within a month after the term of payment, for that year she was not bound to accept of the restricted sum, but might recur to the full benefit and extent of her contract, notwithstanding of her *remissio juris*, which was only conditional; but then she bore the public burdens *pro tanto*. *Vol. I. page 531.*

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1692. *December 7 and 13.* JOHN STRAHAN *against* PATRICK TELFER.

*Dec. 7.*—JOHN STRAHAN, writer, *against* Patrick Telfer. The Lords found the bond of cautionry given by John Strachan to Telfer, for presenting George Smith, and paying what he should be decerned in, null, on thir three grounds; because the Lords had decerned them to find caution to one another, which Telfer failed to do, finding only Robert Curry, a broken man, cautioner, which being rejected, Strahan's bond was *causa data causa non secuta*. *2do*, That Telfer was *in mora* in raising his wakening, and discussing his claim *against* Smith. *3tio*, That Smith being now dead, and this being of the nature of a presentation and *cautio judicio sisti et judicatum solvi*, it was by Telfer's fault turned imprestable.

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*December 13.*—ON a bill given in by Telfer *against* Strachan, about the bond of cautionry declared null, *supra 7th Dec.* current; the Lords found the last ground of reduction not solid, viz. that being *cautio judicio sisti et judicatum solvi*, it expired with the death of the principal party, for they thought a cautioner *judicatum solvi*, as Strachan was, became not liberate by the principal's death; but sustained his *absolutor*, and reduced the bond on the first two grounds, and added to the first,