Pourie and Mr William Stirling, writer, mentioned 16th February 1693; and found the qualifications of fraud condescended on by Pourie not sufficient to reduce Mr William's rights; *viz.* that it was between conjunct persons, and that he had been the agent, and the disposition was on the matter *omnium bonorum;* seeing what was not disponed to Mr William was thereafter disponed to other creditors, and that he kept up his rights, and forbore to take infeftment till Provost Rait and Mary Watson were broke: For the Lords saw Mr William instructed *scripto* the onerous causes of his right, and had deponed he had no trust of her affairs as agent then, and that there was no collusion; but the debts were just and due, and standing out unpaid; and that he was not bound to inquire into their condition, Pourie's debts being all contracted after his. But found it relevant, if Pourie would prove, by Mr William's oath, that he forbore to take infeftment, on purpose to insnare others to lend them money when he knew them to be broke; for fraud, being *actus animi,* unless qualified by very pregnant presumptions, can only be proven *scripto et juramento.* And yet it is hard such sinister designs should escape unpunished.

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1693 *and* 1694. The EARL of MELVIL *against* The EARL of PERTH.

[See the prior parts of the Report of this Case, Dictionary, page *355.*]

1693. *December* 28.—PHILLIPHAUGH reported the Earl of Melvil against the Earl of Perth. The DEFENCE was,—You have already elected your manner of probation, by the defender's oath, and he has already deponed; and therefore Melvil cannot recur now, to prove his summons by writ. The Lords, having considered the Earl of Perth's oath, they found he had not given a distinct, positive, and categoric answer to the second, third, and fourth interrogatories inserted in the commission; and therefore allowed the pursuer, *quoad* these, to prove them *scripto,* as he thought fit. *Vol. I. Page* 586.

1694. *January* 16.—The Earl of Melvil's cause against the Earl of Perth, mentioned 28th December 1693, being heard in presence, on a bill of Perth's, the Lords adhered to their former interlocutor; and found a difference between an oath taken to lie *in retentis,* and an oath taken on an act of litiscontestation: for, in the last case, it could not be considered till *avisandum* was made, and it came in, by the course of the roll of concluded causes, to be advised; but, in the first case, it might be considered *ad hunc effectum,* Whether any other probation might be received, and if it was compatible therewith. And also found, seeing the Earl of Perth had not answered the interrogatories, therefore Melvil might adduce write for proving these, but not in relation to any of the points he had answered; and would not allow him to explain himself in a reëxamination, as was sought; seeing the pursuer now passed from his oath.

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January 23.—The Lords advised the cause between the Earl of Melvil and the Earl of Perth, mentioned 16th current, and found the king's letter was a sufficient warrant for passing the act rescissory of Melvil's forfeiture, though he was then sitting commissioner; especially considering the ratification thereof,

obtained in the subsequent session of that Parliament, held by Duke Hamilton in 1693: and found, seeing King James's letter bore Melvil's specific sum, that it was all one as if the Earl of Perth had received it immediately out of Melvil's hand; and that it was but *fictio brevis manus*, though it was not the same species of money; and that its having been paid into the treasury, and to the king's cash-keeper and receiver, did not so innovate the property but that Perth, having received his precept for that individual sum, he must repay it, because of the express tenor of the two Acts of Parliament, which are excepted from the act *salvo jure*. And it was remembered, that, in the late government in 1672, the Earl of Callender and Sir Alexander Hope of Carse were decerned to restore sums of money they had received out of the Treasury, of the forfeiture of the Earl of Bramford; because the same was rescinded in Parliament 1661, and he restored *per modum justitiæ*. *Vol. I. Page* 596.

February 23.—The Lords advised the cause betwixt the Earls of Melvil and Perth, mentioned 23*d January* last, whether the judicial instrument, produced now by Melvil, containing the writs made use of by him to prove that Perth got his composition, was such a transumpt as was probable without the principal writs. And the Lords found it was not; seeing it did not proceed on a summons of transumpt, but only on an exhibition; and that the bill whereon it was granted, bore, in its petitory part, to give him a transumpt of these writs, to give out in his process; and these words in the interlocutor, "that it should make faith as fully as the principals," wanted a warrant. For thir instruments differ only from copies, in these two things,—that they are taken to give out in processes, that the principals, in the mean time, may be taken up, lest they be lost, going through so many hands; and *secondly*, to serve as adminicles in proving of tenors. *Vol. I. Page* 616.

June 14.—The Lords decided sundry points in the cause of the Earl of Melvil against the Earl of Perth, mentioned 21*st February* last, for restitution of the composition for his forfeiture:—1*mo*. That the £200 sterling of bygone rents fell under the Earl of Melvil's special act as well as the rest; for the Lords shunned to decide on the general act rescissory of forfeitures in 1690: though Mathæus, and other lawyers, think these restitutions *strictissimi juris*, and not to be extended. 2*do*. They found, that Perth's receipt of the money, with the king's letter, and the treasurer's precept, instructed sufficiently that Melvil paid these sums. 3*tio*. They repelled the nullity that Perth's receipt wanted writer's name and witnesses; in regard of the universal custom of all such receipts following on precepts out of the treasury, which are as much privileged from the general rule as either bills of exchange or master's receipts to tenants. 4*to*. They found, though Perth's receipt wanted a date, that it was no nullity, seeing it was presumed to be of the same date with the precept; and that he then received the money, and so must be liable for the annualrent of it, at least from Martinmas 1688, as the act provides. Some were for its not commencing till the government was settled on King William, which was in April 1689. Others argued, that the receipt, wanting a date, was not probative of its time, and so needed astruction and adminiculation; and proposed, that John Drummond, then cashier, might be examined anent the time of the payment: but the plurality carried, that, considering Perth's station, as chancellor, and John Drummond being his servant, it was presumable he had got instant payment after the precept. The Lords also found, though his receipt bore that the £200

sterling was to be disposed of by the king's appointment, and so not to Perth's own use, (but for the missionary priests, as is supposed,) yet Perth must refund it, unless he instruct how he employed it; which they dare not do, in regard the supplying seminary priests, to pervert the nation, is treason.

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1694. *June* 19. BOWER *against* BAILIE FYFE and ROBERTSON.

IN a cause, between Bower, Bailie Fyfe, and Robertson, it fell to be considered, if Bailie Fyfe's oath could be summarily advised as plainly negative; and next, if the quality was intrinsic, or behoved to be proven *aliunde*. The case was, He had charged on a bond of 200 merks. The reason of suspension was, It was for a fine imposed for a delinquence of theft, which he componed for that sum; and so it belonged to the town, and their treasurer behoved to uplift it. The Bailie depones, That the true cause of the bond was not borrowed money, as it bore, but a fine; and that he, by the rest of the magistrates' warrant, applied it to some pious uses, as is very usual, without having any writ to instruct it.

Yet the Lords found this quality extrinsic, and that his oath could not prove he had warrant for his application and payment; but rejected it, unless he prove it by the magistrates then in the office with him, or otherwise. For the Lords thought,—1*mo*. It was a transacting and huddling up of crimes, to commute corporeal punishment into money, contrary to *S. C. Turpilianum*. 2*do*. The money being the town's, he should not exoner himself by his own oath.

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1694. *February* 2 *and June* 20. SCOT of MALLENY *against* SIR JOHN GIBSON of PENTLAND.

Feb. 2.—ARNISTON reported Scot of Malleny against Sir John Gibson. The Lords found, though Scot refused to debate on Sir John's declarator of molestation, and there was a protestation against him for not insisting, yet he ought still to be reponed to insist in adducing his probation as to the meiths and marches, he first paying Sir John's expenses in the cognition already taken; but superseded to give answer to the farther debate,—*viz*. that he had a decreet of perambulation, clearing the marches in 1620, with their answer, that Pentland had prescribed a part of that, by forty years' possession since, and the reply of interruptions, both *via facti et juris*, and by minorities, and by one tenant's possession of both the roums, &c. till they were farther heard. *Vol. I. Page* 600.

June 20.—In the action of molestation, between John Scot of Malleny and Sir John Gibson of Pentland, it came to be debated, If it be a sufficient interruption of the prescription, that one tenant, for several years, possessed both heritors' lands. Many thought, that a joint promiscuous possession by a tenant could be beneficial to neither, *nec prodesse nec obesse*, and could not be counted