

1694. *January 10 and July 24.* MR HARY SCRYMGEOUR, Parson of Dundee, *against* DR WEYMES.

*January 10.*—ARNISTON reported Mr Hary Scrymgeour, parson of Dundee, and Dr Weymes, lately principal of St. Andrew's, competing for the stipend of the first minister of Dundee, which Mr Hary claimed, as still minister there. And the Lords thought the church not vacant, though he had desisted to preach, seeing he was neither deprived by the council, nor any church judicature: but, in regard it was alleged, that *titubavit de jure suo*, in so far as he had taken a gift of this stipend from the privy-council, as vacant, and he alleged it was only to prevent the application of others, who were seeking it, and would have put him to some trouble, the Lords ordained that act to be produced.

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*July 24.*—In the competition for the stipend of Dundee, betwixt Mr Hary Scrymgeour, late parson thereof, and Dr Wemyss, late of St. Andrew's, for crop 1692, mentioned 10th January 1694; the Lords preferred Mr Harry, because it does not appear the said church was then vacant, either by demission or deprivation; and so was not at the privy-council's disposal, by their act to Dr Wemyss.

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1694. *July 24.* LORD SINCLAIR *against* SIR JAMES COCKBURN of that ilk.

UPON a bill, given in by the Lord Sinclair, against Sir James Cockburn of that ilk, and his answers, the Lords found, the land would either set in farm or sell the better that the common debtor was removed from the house and parks, &c.; and, therefore, ordained him to remove, but gave him to Michaelmas next, because he might have his corns on the ground; but found, they could not roup it, without diminution of the present rental, but that it behoved to be kept up: And Sir James Cockburn, by a bill, craving to be continued, because he offered to find caution to make his intromission forthcoming, the Lords thought they could not force the creditors to accept of a tenant or factor against their will, though they offered caution; therefore they refused the bill.

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1694. *July 25.* JOHN KER and RACHAEL KER *against* WAUCHOP of NIDDRY.

THE Lords advised the cause pursued by John and Rachael Kers against Wauchop of Niddry, for payment of £1000, contained in his father's bond. The Lords, *ex officio*, had examined witnesses on sundry presumptions, that it was granted *ob non causam*, for a transaction and disposition in 1654, between him and Ker of Lochtour, which never took effect; and, having advised the probation now, they find it proven that it was so granted, and therefore assoilied. Though this be a dangerous preparative, to take away clear bonds by witnesses' depositions, yet there was so clear a chain of presumptions connected

here, that the Lords were convinced that this bond was granted in contemplation of the disposition then given, and which never took effect, but was passed from by entering into a new bargain in 1661, where two thousand merks is advanced in money, and a bond for 10,000 merks given, and the old £10,000 bond is forgot to be retired : and thir pursuers' mother lived twenty-one years after, and never claimed the first bond, but accepted annualrent of the second yearly ; which she would not have done, if the first had been a perfected bargain.

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1694. *July 25.* M'LELLAN of CALIN *against* SIR THOMAS BURNET, Doctor of Medicine.

MERSINGTON reported the bill of suspension, M'Lellan of Calin against Sir Thomas Burnet, doctor of medicine. His reason of suspension was, That though the bond was for £100 sterling, yet you declared, if I paid at Candlemas 1200 merks, you would accept of it ; and I, being disappointed then of money, am content to pay it now.

The Lords found this was not a penalty, but a restriction, and, having failed, he cannot now be admitted to purge it ; and was not of the nature of *pactum legis commissoriæ in pignoribus* ; and, therefore, refused the bill, and found him liable in the whole.

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1694. *July 26.* The EARL of PANMUIR *against* SIR PATRICK HEPBURN and SIR JOHN HALL.

THE Lords advised the debate betwixt the Earl of Panmuir, and Sir Patrick Hepburn, and Sir John Hall, for payment of the feu-duties of the lands of Auchmethie ; against which compensation was proponed, that, by a charter, the feu-duty was converted into ten shillings Scots for each boll of corn, or the bolls themselves, in the option of the *solventes* ; and yet they had exacted the full ; and so, *condictione indebiti*, ought to repeat.

ANSWERED,—*Imo.* There was a decret of Exchequer, decerning them to pay, to which the Lords were not competent judges ; but it behoved to be reduced before that sovereign court. *2do.* The conversion was illegal, being before the act of dissolution.

The Lords debated long, whether the compensation met, and was liquid ; and if they had right and interest to propone it ; and, anent the reservation in the decret of Exchequer to the Lords of Session, to cognosce on the validity of the charters converting the feu-duty. But at last, before answer, ordained the original charters, given to the Guthries of Auchmethie, where the said conversion is first made, to be produced.

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