

1699. *July 21.* WILLIAM BETON of CRAIGFORDY *against* BARCLAY of CALLERNY.

Mr William Beton of Craigfordy, advocate, gives in a bill to the Lords complaining that Barclay of Callerny was building a dovecot on the confines of their lands, though he had not ten chalders of victual within two miles of the place, the bulk of his estate lying at a greater distance; and he having pursued him before the sheriff of Fife to desist *per novi operis nuntiationem*, he had procured an advocacy of the cause to the Lords, which could not be got discussed this Session; therefore craved the Lords might stop the work *medio tempore*, *damnum infectum* being safer than *post vulneratam causam remedium querere*.

The Lords thought there was more ground to stop than to demolish after it is built, especially being on the marches *in emulationem vicini*; and that they had sustained a process on the act of Parliament 1617, to *Sir John Shaw of Greenock* against *Crawford of Carseburn*, as mentioned *supra 29th December 1698*; and President Newton observes that the like was decided *15th November 1682, Dury* against the *L. of Balmuto*; therefore, no answers being made to the bill, they granted the desire thereof. *Vol. II. Page 63.*

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1697, 1698, and 1699. LORD BARGENY *against* AGNES and DOROTHY KENNEDIES and WILLIAM FERGUSON.

1697. *July 14.*—THE Lord Bargeny pursues Agnes and Dorothy Kennedies, and William Ferguson, husband to the said Agnes, for declaring a bond of 3000 merks, granted by his father to their's, extinct and satisfied, on thir presumptions, That, though it be dated in 1674, yet it was never heard of till now, nor annualrent craved, though Kennedy of Auchinblane was a rigorous creditor; and, when he died, it was not given up in the inventory of his debts, &c. ANSWERED,—There may be a hundred reasons to move a man to forbear craving of a debt; likeas, he did not live long after the bond was granted. REPLIED,—The presumptions are mainly urged to this effect, To cause him condescend how he came by the bond, and in what third party's hand it was before; seeing my Lord Bargeny's clerk to his baron-court had the bond, and gave it up; and so it must be presumed he had it from Bargeny as his retired evident; *et instrumentum apud debitorem repertum præsimitur solutum*. DUPLIED,—It is *peissimi exempli* to force creditors to condescend how they recovered their own writs, they being now in their hands; and you can only take it from him *scripto vel juramento*; for, though he was Bargeny's clerk, he was a common notary, and served the country round about who employed him; and the getting it from him infers nothing.

The Lords ordained Kennedy and Ferguson, the defenders, to condescend, upon oath, on the way and manner how the said bond came to their hand, and from whom they got it, and if they gave any gratification for it; reserving to themselves to consider what it should import, or to open some discovery to my Lord Bargeny where he may seek for receipts or discharges to extinguish this

bond ; though some went a greater length, to have the notary examined how he came by the bond. But that, being of dangerous consequence, and too arbitrary, was waved by the Lords at this time. *Vol. I. Page 785.*

*November 30.*—Mersington reported the cause, mentioned 14th July 1697, between the Lord Bargeny and Kennedies, wherein they urged to have Abercromby, the notary from whom they acknowledged they had got the contract of wadset, to be examined how he came by it ; especially seeing he had the other principal double lying beside him cancelled. ANSWERED,—This might prove a great insecurity to the lieges, if bonds of borrowed money could be thus taken away by witnesses. REPLIED,—It is no new thing, for expiscation and trial, to examine witnesses, where pregnant presumptions concur ; and on such a probation bonds have been found satisfied and extinct, not only by ancient decisions in Dury, but also of late, *24th February 1669, The Earl of Annandale against Young ; 2d and 3d February 1670, Jack against Boyd, and The Earl of Kinghorn against Pittarrow ; 27th February 1666, The Lord Gray and his Creditors ; and ——— 1687, The Duke of Hamilton against Cunningham.*

The Lords were very tender in this point ; yet, *ex officio*, and before answer, allowed Abercromby to be examined on this interrogatory only, Whether he has the other double of this contract lying beside him cancelled ; which, if he acknowledges, then to be farther interrogated, from whom he got them, and on what account. But, if he deny the having it, to be no farther examined.

The like was decided, within these twelve months, between *The Earl of Annandale and Lag*, and between *The Earl of Northesk and Kinfauns.*

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*December 15.*—In the action, mentioned 30th November 1697, between Kennedies and the Lord Bargeny, several objections were made against Abercrombie, the notary, why he should not be examined ; and, among others, this exception, That he had discovered what he could say in the cause by giving a written declaration, under his hand, of the way and manner how he came by the said contract of wadset ; which, being *proditio testimonii*, was sufficient to cast him. ANSWERED, What a man declared, *ad exonerationem et levamen conscientie*, to a minister, cannot be called a betraying his testimony, where he is pushed forward to it by pangs and horror of conscience, as this man was, for his unwarrantable upgiving of this contract to Ferguson ; else all such discoveries of villany might be discouraged and stifled. REPLIED,—*Proditio testimonii* is a legal objection for casting a witness, when he prompts a party to believe he will favour his cause, if he be adduced a witness therein ; and if the revealing it to a minister be sufficient to elide and take off this objection, then every man shall take that indirect method of causing the party he intends to adduce as a witness to go and discover it to the minister ; which is *fraudem legi facere* ; and, if allowed, *proditio testimonii* shall never take place. The Lords had no doubt but this declaration behoved to be cancelled before he should depone, to put him at full liberty and freedom. That was not the question : But the debate lay in this, whether the emitting that paper made him inhabile in law ? They thought it would have been fraud if it had been discovered to Bargeny, or to any upon his account, and they had directed him to go and make confession to the minister of the parish : But they allowed the witnesses adduced to prove this objection against him ; to be interrogated if they knew that he revealed it to any before he went to the minister, and to whom ; and, at advising, the Lords would consider what it should operate.

And it being objected against one of the witnesses adduced by Ferguson, husband to one of the Kennedies, that he was menial servant to Kilkerran, the pursuer's father;—ANSWERED.—*Non relevat*, unless he were his own servant; especially seeing the son is not *in familia* with the father, but forisfamiliaried by marriage. The Lords allowed him to be received *cum nota*; some were for taking him simply.

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1698. *January 5.*—The Lords resumed the consideration of the cause, mentioned 15th December 1697, between Kennedies and Ferguson and the Lord Bargeny; and Abercrombie, the notary, having deponed *in præsentia*, the Lords found, by his own acknowledgment, he had malversed in giving up that wadset, which now he deponed was a retired evident; and that he had done it in prospect of a bribe; therefore the Lords, on account of his prevarication, sent him to prison. Bargeny, in retaliation of this, loaded the defender, in the end of his information, with a *congeries* of tricks and cheats he had played in Carrick; and so *semel malus semper præsumitur in eodem genere*. Some of the Lords moved, if these were proven, it would fortify much Bargeny's accumulated presumptions of his fraud in coming by the right of this wadset. Others argued, thir facts condescended on were extraneous to the case in hand, and ought not to be tried here; but my Lord Advocate might pursue them as falling under the *crimen stellionatus*; and, *esto* he were guilty, what does that to the forfeiting his wife's and goodsister's right of the wadset, he having only a claim, *jure mariti*, to the annualrents of the half of the wadset sum? Yet the Lords inclined to take trial of these particulars; Lord Bargeny signing the accusation, (which he did immediately at the bar,) that, in case it were found calumnious, my Lord might be fined, in reparation of his good name now stained by this accusation.

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1699. *July 26.*—The Lords advised the cause, mentioned 14th July 1697, pursued by Lord Bargeny against Agnes Ferguson and Kennedy, her husband, anent the presumptions that the wadset of 3000 merks owing to Auchinblane, her father, was retired and paid; and they found the probation so pregnant that they reduced the bond, and found it extinct by payment. Most of the Lords were convinced, by this circumstance, that, in the minute of agreement whereby Auchinsoul sells the lands to Auchinblane, my Lord Bargeny's bond is mentioned as a part of the price; and, shortly thereafter, there is a bond for the equivalent sum given by Bargeny to Auchinsoul, which evinces the payment to a demonstration: for the Lords would not lay the weight of their decision on the testimony of the witnesses, in respect they should not be allowed against writ, especially where their fame is exceptionable, as Abercromby the notary's was here; and therefore the Lords proceeded mainly upon the evidences in writ, evincing that this bond was retired and satisfied.

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1699. *July 1 and July 26.* JOHN MOWAT against SIR ALEXANDER CUMMING of CULTER.

*July 1.*—THERE were mutual complaints given in by Mr John Mowat, and Sir Alexander Cumming of Culter, advocates, wherein they grossly reflected on one