

for the absolution proceeded because there was no title produced for the pursuer to the lands; and he being minor, it cannot prejudice him that his tutor's factor used a warning, seeing, in the removing, he produced nothing to instruct that his pupil had any right to the land. To the *second*, There are no clauses more odious in law than *pacta legis commissoriae in pignoribus*; and they can never take effect till there be a decret of declarator obtained thereupon, where I would have got a competent time to purge the irritancy; and his ceding the possession signifies nothing, for he was, long before, denuded of the reversion. To the *third*, To transfuse a wadset under a back-tack to a proper wadset, is to change and alter the nature of rights *toto cælo* different, and you have acknowledged yourself to be subject to account: in the transmission of the rights it is expressly provided that you shall relieve the disponent of the surplus rents.

The Lords repelled the defences, and found no *bona fides* in the case; and ordained him to account for the excresce, allowing all his deductions as accords. My Lord President thought, in those cases where the rent did but in a small matter exceed the annual rent of the wadset sum, it was hard to expose the wadsetter to a tedious account; but here the excresce was more than £40 by year, and the reverser had paid all the public burdens. *Vol. II. Page 358.*

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1707. *March 18.* FRANCIS MOLLYSON *against* CLARKE, YOUNG, and SPENCE.

FRANCIS Mollyson, merchant in Brechin, being their commissioner to the Parliament, the foresaid three persons, his creditors, arrested his fees in the magistrates of Brechin's hands. He gives in a bill to the Lords, complaining of these arrestments as illegal and unwarrantable; seeing, as the Members of Parliament their persons cannot be attached by caption or imprisonment, so neither can their fees or salaries be arrested, being of an alimentary nature, and as much privileged as the officers of state their dues, which, by an Act of Sederunt in 1613, were declared not arrestable: and all he has allowed him is only half-a-crown a-day, which, considering chamber-rent, horse-hires, diet, and other incident charges, will be but a scrimp aliment to a moderate man attending the Parliament; and therefore craved, since they were unduly laid on, that they might be loosed without either caution or consignment.

ANSWERED,—The Parliament being yet current, he had not yet served out, nor earned his fees: Neither is every thing, without which a man cannot conveniently live, to be reputed a privileged aliment. And, as to the exemption of Parliament members from caption, there is no law in the case, nor any breach of privilege, if done. All that can be pled is, The Parliament may require their man, and set him at liberty to attend them, if they please; but otherwise he may legally be detained. In England their privilege is greater; for it extends to their goods and servants, but has never been so understood here. *Stair, lib. 3, tit. 1, page 375*, shows that servants' fees are not arrestable, in the case of *Mr Beg against Davidson*, preceptor of Heriot's Hospital.

The Lords, by the Chancellor's vote, found the commissioners to Parliament their salaries not arrestable; and therefore loosed them without caution or consignment: though it was remembered that, in 1690, the Lords having loosed an arrestment, without caution or consignment, in favours of Hay of Park, they did

satisfy the creditor-arrester, and took the payment of the debt upon themselves, as being legally loosed. It had been done by one or two of their number, but the whole submitted to the payment. *Vol. II. Page 362.*

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1707. *March 22.* BRODIE of LETHAM *against* SIR JAMES CADEL of MUIRTON.

LETHEM standing infest in a part of the barony and abbacy of Kinloss, with five stell salmon fishings in the river of Findhorn, and ALLEGING, That Muirton had wronged and disturbed his fishing; he raised a declarator of molestation, to hear and see it found and declared, that he has the undoubted right of property of the said five cobles of salmon-fishing, and to the corff-house and yard thereto belonging; and that the said Sir James has much damnified and impaired his fishing, by building a new town near to the said stells, which are deep ponds, pools, and ditches in the river, where the salmon haunting are taken in nets spread beneath them; and that, by many acts of encroachment, such as the floating, sailing, anchoring, and mooring of his boats, ships, and cobles, just upon the place of these stells, the keels and anchors making such furrows in the strand and *alveus* of the river, as wholly chases away the salmon from their former haunts. *2do*, By casting in their ballast and fish-guts into these stells, which not only fills them up, but likewise so corrupts and poisons the water that the salmon desert that place. *3tio*, By planting his muscle-scalps in or near the said stells. *4to*, By the noise and shadows of the carts and horses that are daily loading and unloading goods, they scare away the fishes; it being known that the very shadow of a man, for their self-preservation, makes them run away when they hear or see them on the banks of the river. *5to*, Sir James has built his new town just on the brink where Letham's stells are placed, which, by the constant resort, and the filth of the town being constantly cast in at that place, effectually chases them away. Likeas, he has built it on a commonty betwixt Letham and him; and therefore he ought not only to demolish it, but also to forbear all these deeds of encroachment, disturbance, and invasion, that have brought Letham's salmon-fishing, formerly set to this same Muirton at £1000 *per annum*, that he can scarce now get 500 merks for it. And also to pay him all his bygone loss and damages by poisoning the water, filling up his pools, harbouring his boats there, and so frightening away his salmon.

ANSWERED for Muirton,—That it seemed very mysterious and strange what made the salmon in Findhorn river more nice and timorous than they are in the rivers of Ness, Spey, Don, Tay, &c. where it is known that such public repair of ships, men, horses, &c. scare not the salmon from these waters: so thir are but chimerical imaginary prejudices at most. But, *2do*, *Esto* they were real; yet, if I be using my own property for my advantage, *sine amulatione vicini*, no law in the world can hinder me, though an accidental prejudice arise to my neighbour; that not being my design, but only the improvement of my own ground. *3tio*, The mouth of this river being broad and navigable, the providence of God and nature has appointed it for the use of commerce and trade, by exporting and importing goods for serving the adjacent country: And Letham's private interest of fishing must cede to the public good and benefit of