

should omit the same, he was free. And it was found, in the case of the Creditors of Swintoun, that old Swintoun, having disposed his estate to his son, with power to affect the same with wadsets, and having borrowed sums expressly upon that clause, yet the same was not sustained against the donatar, because they were not wadsets *in forma specifica*. It was replied for the pursuer, That the disposition of Meedhope, being gratuitous only, with the burden of 13,000 merks, the faculty to legate is not to be interpreted strictly, as if the lands had been bought for a full price; in which case, the hazard of not legating might have been a motive to make the bargain: but Sir Robert's will to burden Sir John was the thing truly meant; and though expressed under the name of legacy, because, *de jure*, legacies cannot burden heritage, Sir Robert's will, in his *liege poustie*, must be far more effectual. And, as to Swintoun's case, the reason why the creditors' personal bonds were excluded, was not because they were not *in forma specifica* contracted as wadsets, but because, being no real rights by infestment, they could not burden the fee in prejudice of the donatar of the fiar's forefaulture. And the equivalent is no way alike, for a personal right is less than a wadset; but the will of any person in his *liege poustie inter vivos*, is more than a legacy. And, albeit Sir John, who paid this sum, took assignation, he could not therewith have distressed Sir Robert; seeing he could not have excepted upon the 3000 merks, whereof he had power to legate, or otherwise he could have redeemed for a rose-noble; and so, seeing Sir Robert could not have been effectually burdened, neither can his heir, or his other estate. The Lords found, That Sir Robert Drummond's will, being expressed by this bond, to relate to Meedhope, and could be attributed to nothing but the faculty to legate; that the same was sufficient to burden that estate, though not in the form of legacy.

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1675. *January 26.* HECTOR M'KENZIE *against* GRANT.

ALEXANDER M'Kenzie, having obtained a decret of registration against Grant of Glenmoristoun, as representing his father upon the passive titles, Hector, as heir to Alexander, pursues transference. The defender alleged Absolvitor; because the decret of registration is null, in so far as it bears, That the defender was holden as confessed, being lawfully summoned; and doth bear, By a messenger-at-arms, personally apprehended; and therefore is null; because no party is ever holden as confessed upon another citation: and, therefore, decreets do still bear, that parties were holden as confessed, *because* they were lawfully summoned by a messenger-at-arms, "personally apprehended." It was answered, Though it useth to be expressed, and, being quarrelled *de recenti*, might be a ground to recal or reduce the decret, when the executions would be found to instruct whether it was personally by a messenger or not, yet the decret of registration being obtained *in anno* 1648, and never quarrelled till now, that there is a reduction raised; the same cannot be found null; because, *in actis judicialibus, omnia presumuntur sollenniter acta*. And, in this decret, the defender was compearing: and it cannot be presumed that the defender's advocate would have suffered him to have been holden as confessed, if

the citation had not been truly given, personally, by a messenger ; which being obvious, and omitted, the decret, after so long a time, cannot thereupon be annulled. The Lords sustained the decret, unless the defender, upon his reduction, would offer positively to prove, by the executions, that the citation was not by a messenger personally.

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1675. *January 29.* SIR JAMES STAMFIELD *against* The EXECUTORS of the DUKE of LENNOX.

SIR James Stamfield and his partners having pursued adjudication of a ship, before the admiral, he did declare the same prize ; whereupon the tenth part of the value was paid to the admiral, and the fifteenth to the king : but thereafter, the Lords having reduced the admiral's decret, and freed the ship ; the privateer having craved deduction of the tenth and fifteenth parts, which he had paid, by virtue of a standing decret for the time,—the Lords allowed the same, reserving action against the admiral for the tenths, and application to the Exchequer for the fifteenths : upon which application the Exchequer did repay, to the stranger, the fifteenths. And now Sir James Stamfield pursues the executors of the Duke of Lennox for the tenths ; who alleged Absolvitor ; because the tenths being the honorary or salary due to the admiral, albeit his decret was reduced, he was not liable for repetition, more than inferior judges are liable for sentence-silver, which is the twentieth part ; especially, seeing there was neither fault nor fraud found in the admiral, whose decret was reduced upon other grounds and considerations than were moved before the admiral : nor could it be pretended that the tenths were paid *causa data et non secuta* ; because the true cause was not the confiscation of the ship, but the sentence of the admiral, which followed. It was answered, That the tenths of prizes are a casualty due to the admiral by the privateer's commissions and custom, when prizes are declared ; but not for the salary of the Judge of Admiralty, whose pains are alike when ships are freed as when they are adjudged ; but it is a part of the profit of the war against enemies, which the king reserves from the private men-of-war, in the same way as the king's own fifteenth part is. The Lords repelled the defence ; and found the defenders liable for repetition of the tenths.

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1675. *February 9.* MR LEWIS DUNLOP, MINISTER of SKEEN, *against* The HERITORS thereof.

*IN anno* 1648 there was a decret of locality of the kirk of Skeen, in which a part of the tack-duty due to the parson of Kinkell (which parsonage is annexed to the Deanery of St Andrew's,) was allocated to the minister, and hath been so possessed till now. This minister pursues the heritors for the local stipend ; a part whereof is the vicarage. They allege, *1mo.* That they are not liable to the minister ; because, by the Act of Restitution of Bishops, they and their deans