

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.

*Vol. II, Page 310.*

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.

*Vol. II, Page 313.*

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

are restored to all rights and possessions they had *in anno* 1637, when they were expelled: so that the heritors are liable to the dean of St Andrew's; and the minister must apply himself to the commission for a new locality. It was answered, That, albeit the Act of Restitution would exclude the minister's interest as to the tack-duty due to the dean, yet that Act cannot be extended to the benefit of a possessory judgment, or *decennalis* or *triennalis possessor*, attained by the minister after the Act of Parliament; so that he, having bruiked seven, ten, or more years after the Act of Restitution, by virtue of his presentation and decret of locality, he is preferable *in hoc judicio possessorio*, till, *in petitorio*, the dean reduce the minister's right, or declare his own: and here the Dean concurs, and alleges, There is sufficient free teind in the parish, both to give the dean his full tack-duty, and likewise the minister his whole stipend. The Lords found the allegiance for the minister, of seven years since the restitution, relevant *in possessorio*; but did not prefer both the dean and minister, upon sufficiency of teind, which is only competent to the commission for plantations.

*Vol. II, Page 320.*

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1675. *February* 18. JOHN DAIKELL *against* DAVID HUME.

JOHN Daikell, merchant in London, having charged David Hume for payment of £20 sterling, due to him by bond, granted by the late Earl of Hume, as principal, and him as cautioner, whereupon he had obtained decret of suspension; the said David suspended, the second time, on this reason,—That this bond being granted in England, to a merchant there, the Earl of Hume was incarcerated, or arrested in prison, upon this very bond; and, before he was liberated, (being under the guard of his keeper,) he died: and, by the law of England, the principal debtor so dying in prison extinguisheth the debt, and there can be no farther satisfaction thereof. It was answered, That the decret of suspension *in foro* is opposed, wherein this was proponed and repelled; and so is not now receivable. It was replied, That the decret bears it was repelled, in respect it was not eiked nor libelled; yet, upon consigning of £12, the same was receivable; and, *medio tempore*, it was unwarrantably extracted shortly thereafter. The Lords reponed the suspender, upon consignment of the £12, and paying the expenses of the decret of suspension; and sustained the reason of suspension, to be proven by the judgment of the Judges of the Common Pleas in England, by the mouth of the Chief Justice.

*Vol. II, Page 324.*

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1675. *February* 23. The MARQUIS of DOUGLAS *against* WILLIAM SOMERVEL.

THIS cause being debated upon the 23d day of December last, the Marquis further insisted, upon this ground:—That William Somervel could not defend himself with the rental of the lands in question; because, after the rental, his father had taken a feu-right of the same lands, in favours of his son, to whom he had formerly procured the rental: which feu, as being a more noble and incom-