

clerk's hands, the money for which the comprising was led. In which case, they would admit Captain Hume of Foord's interest, to prove the comprising was extinguished, or satisfied in whole or in part. *Vol. I. Page 263.*

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1679, 1680, and 1684. JOHN HOPE OF HOPETON *against* GEORGE YOUNG and THE EARL OF WINTON.

See the prior part of this case, Dictionary, page 15,718.

1679. *February 26.*—JOHN Hope of Hopeton pursues a declarator of fraud and circumvention against the Earl of Winton and George Young, for reducing the said George his rental and prorogation of some lands in Winchburgh. (*Vide* 17th July 1678.) ALLEGED,—You Hopeton can never quarrel this, because you have taken the disposition with the burden of this right of George Young's, and have expressly excepted it, that it shall not be leisome for you to quarrel it upon any ground, but only not payment of the tack-duty.

REPLIED,—The reason of that was, because the Earl alleged he would be liable in warrandice to George if it were not excepted. Now this was a circumvention; for the rental was to my Lord's own behoof.

This being reported, the Lords repelled the reason of reduction, in respect of the clause *in græmio* of Hopeton's own disposition.

Then Hopeton gave in a bill, craving my Lord's oath, and of the comuners at the bargain, on this,—if he did allow Hopeton to quarrel that rental, providing the warrandice should not recur against him; and that it was not a true date, and was not then delivered.

The Lords ordained the Earl to depone thereon, in presence of the comuners if they pleased; which he did before Sir John Dalrymple, Sir Walter Seton, Mr Archibald Hope, and Doctor Livingston, and denied it: which being advised, the Lords assoilyied from the reduction.

Some Lords were of opinion, that, being a circumstantial circumvention, it was both just and necessary the Lords should have examined the comuners; but the Lords dispensed with this, (which in other cases they would have done,) from their deference to my Lord Winton. *Vol. I. Page 45.*

1680. *February 24.*—In Hopeton's suspension against the Earl of Winton, (26th Feb. 1679;) the Lords found, that Hopeton having bought Winchburgh, &c., by a rental, and at the tail of it having declared himself satisfied therewith, he could not now retain of the price either upon the account that he offered to prove that some acres were twice charged, or that there were some called 14 acres, which after measure would not be 10, seeing in these cases *caveat emptor*, and he may gain as much upon the measure of other acres. And they would not burden the Earl to prove they were commonly holden and reputed so many acres. *Vol. I. Page 87.*

1684. *January 24.*—The Laird of Hopeton's case against George Young in Winchburgh, being reported by Kemnay, the Lords adhered to their former interlocutor, dated the 17th July 1678, finding the duty contained in the rental

and prorogation to be for both stock and teind; the defender proving his use of payment, and the Earl of Winton's receiving of that duty.

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1684. *January 26.* The MINISTER of ——— *against* GLENURCHIE, NOW EARL OF BREADALBANE.

THE Minister of ——— raises a reduction, against Glenurchie, now Earl of Breadalbane, of a tack of his teinds which he had set him at the time he did present him to be minister of that kirk; as a simoniacal paction, to the prejudice and dishonour of the church. ANSWERED,—Whatever may be reputed simony by the Canon Law; yet, with us, by the first Act of Parliament 1612, such tacks set by ministers are declared not to be simony, providing he leave to himself and succeeding ministers a sufficient maintenance.

Which, I think, from other Acts, may be interpreted to be eight chalders of victual or 800 merks of money; and that, whether it be *pactum honestum* or *turpe, non refert*, (neither should the setter who is *in pari turpitudine* quarrel it;) seeing all the patrons of Scotland use it at their presenting, and the foresaid act allows it.

This was not decided, but the bishops were very zealous, and threatened they would have these tacks annulled as simony.

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1684. *February 5.* LESSILS and SPOTSWOOD *against* CARMICHAEL and BORTHWICK.

LESSILS and Spotswood against Carmichael and Borthwick being reported by Edmonston; the Lords turned the decret of the Bailies of Haddington into a libel, because it held a married woman as confessed upon her oath, as contumacious; seeing it was *partes judicis* to know that she was not obliged to depone; but allowed them yet to prove her possession, with this declaration, That, if it shall be made out against her, they will modify large expenses for her reclaiming against this decret, now turned into a libel.

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1684. *February 5.* HOME of COLDINGAMELAW *against* KER of MORISTON.

THE Lords found it proven, by the tack and other documents produced, that Moriston's apprising of the said law was in trust, except as to the sum due to himself; and therefore ordained Moriston to count and reckon.

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