

others, anent his right to a servitude of pasturage in some lands,—the defence in the act of litiscontestation being that they had prescribed an immunity from the pasturage, and the reply being on interruption; the reply was proven, but not the defence; whereon my Lord Colvil craved to be reponed to other defences, seeing he was minor at that time, and abroad. The Lords reponed him, if they were *in jure* and instantly verified.

Then he ALLEGED that the pursuer's title was null, being a feu of kirk-lands granted by the Abbot in 1553, and neither confirmed by the Pope nor the King, as is required by the 7th Act of Parliament, 1584. The Lords found the said defence relevant and proven by the charter lying in process; but sustained this answer for eliding it, that they offered to prove confirmed.

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1695. *November 27.* WILLIAM KING and INGLIS *against* ORR and OLIPHANT.

THE suspension presented by William King and Inglis against Orr and Oliphant was reported by Arbruchel. The charge was on a decreet of removing from a shop at the head of Niddry's Wynd in Edinburgh. Their reasons were, That, albeit the decreet was given declaratory before the term, yet it decerned expenses where there was as yet no contumacy; and that he offered to prove, by the charger's oath, she promised never to remove him so long as he paid the former maill; and that, by the perpetual custom of that shop, the entering tenant bought always the brittle ware of his predecessor, as their glasses and lame-pots, &c. All this being formerly discussed, the Lords now repelled the same. Whereupon they recurred to a new reason, That they offered to prove she had consented to a set for another year, and taken earnest thereon. Some doubted of the competency of this allegiance now, after she had, upon oath, denied any promise not to remove them. However, the Lords sustained it, that she might clear her meaning; but *cum onere expensarum* if they succumbed; but especially to consider how far she may be made liable to the succeeding tenant for his damage in not being duly entered; and modify the same against him, if it shall be found that he sat violently contrary to law.

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1695. *November 28.* MR JAMES KIRKWOOD *against* MR JACK.

MR James Kirkwood, late schoolmaster at Lithgow, now at Kelso, having been pursued before the Presbytery for some indecencies in his employment, he raises a pursuit, before the Commissaries of Edinburgh, against Mr Jack, minister at Kelso, for slanderous and reproachful expressions; that he was destitute of the grace and fear of God, and unfit to be trusted with the education of youth, and such like words. The minister presented an advocacy of this process to my Lord Philiphaugh; upon whose report the Lords advocated the

cause to themselves ; though they are not judges to such causes in the first instance ; but, in respect of the prejudiciality of the other action depending against Mr Kirkwood, they thought it reasonable to stop this till the other were tried.

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1693 and 1695. FARQUHAR of GILMILNSCROFT *against* WILSON of SPANGO.

1693. *January 24.*—THE Lords refused to stop execution upon Spango's clear bond, on the pretence of his reduction ; seeing his reduction was not against the bond, but only against the pursuer's right of assignation thereto ; which was reserved to him, as accords.

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1695. *November 29.*—In the mutual actions pursued between James Farquhar of Gilmilnscroft and John Wilson of Spango, the Lords having advised the probation, they sustained Andrew Blair's title as nearest of kin to the deceased Campbell of Glassnock ; and found the disposition granted by the said Glassnock to Gilmilnscroft was proven to be signed the day before his decease, and that he was then so stricken with a lethargic palsy that he did not know the nature of it ; nor was the same read, nor the tenor thereof intimated to him, nor he capable to understand it : and therefore reduced the disposition, and assoiyled Spango. But, in regard it resulted from the testimonies, that John Ferguson, the notary, had been very instrumental in drawing and offering that disposition to the sick man, and yet afterwards entered into a contract with the heir to quarrel it, and was to have a share of the gain in the event of the reduction ; therefore it was contended that he ought to be liable in damages to Gilmilnscroft, in whose favours the disposition now reduced was granted, he having concurred in subverting a right he had been employed to procure.

The Lords thought the being a witness in a writ could not preclude the witness from impugning the same ; but, where one was active to reduce a deed which he had managed and carried on, they thought this might be construed a breach of trust.

The question then arose, How this could be drawn in upon this process, where Ferguson was not a party ? Some moved that they should be remitted to pursue him by way of action. But the Lords, finding that as the fact seemed fraudulent and unfair, they might try it instantly ; and, therefore, ordained him to be cited *incidenter* in this same process, to defend why he should not be condemned in the damages, the disposition being questioned on a deed of his, and made null, as far as he could, by his deposition.

I remember the Lords have sometimes found witnesses liable for damages to the party where the writ has been annulled on their confessing, upon oath, that, at the signing, they did not see the party subscribe, nor hear him give them warrant to sign, conform to the 5th Act, Parliament 1681.

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