they should be consolidated with the stock. Where one has an heritable right to their teinds, or tacks and prorogations, for many nineteen years yet to run, the Lords use to value them at fourteen or fifteen years' purchase, which is somewhat lower than the price of the stock, because they are liable to augmentations of stipends and other inconveniences; whereas the stock is commonly put at eighteen years' purchase, or 2500 merks for the chalder, where the lands hold blench or feu of the King. But if there be no right at all to the teinds in the debtor's person, then the Lords are in use to put five years' purchase on them as their price, because the heritor may buy them for nine years, by Act of Parliament, which two conjoined make up the fourteen years' purchase above-mentioned.

2do, It fell to be considered, what should be modified for house and yards, which appeared, by the probation, to be in tolerable case; and what value should be put on the coal, seeing the witnesses deponed, Though there was no going coal on the ground, yet there was a coal for the working, in some parts four, in others six or eight feet thick.

The Lords thought this might be as well valued as the stool of a wood which had been lately cut; and therefore modified 5000 merks as the worth of the coal, and other 5000 merks for the house and yards, and other accommodations, including the kain-hens, carriages, and other small casualties.

3tio, As to the promulgation at the six adjacent parish-kirks, it was started which would be the most ewest in this case, the lands lying at Dumfermling: Whether all the six churches were to be taken within the shire of Fife, on the north side of the river of Forth, where some of them would be five or six miles distant from the lands; or if the churches of Queensferry, Dalmeny, Cramond, &c. which lie on the south side of the Forth, may not be called more adjacent, there being only two miles of sea; or if the interjection of this broad river and arm of the sea makes such a discontiguity that they are not to be accounted most adjacent. Yet many inclined to think it safest to execute even at these churches likewise; and there can be little reason given why water, though a different element, should hinder continuity more than conjunction by contiguity of land, whose surface is more unequal, does. *Vol. II. Page* 95.

1700. *June* 13. ALEXANDER M'LEAN *against* PATRICK OGILVIE of HALYEARDS.

The Lords advised the concluded cause, Alexander M'Lean, merchant in Inverness, against Patrick Ogilvie of Halyeards. The debate arose from some qualities adjected by Mr M'Lean on his oath. The case was, Alexander had married Halyeards's daughter, and, by the contract, was provided to 2500 merks of tocher: within little more than a year after the marriage she dies, leaving a girl, who did not outlive her long. Alexander charges Halyeards, his father-in-law, for the tocher: He suspends on thir reasons, 1*mo*, That it was made payable when he should add and secure 5000 merks of his own proper means to it; which he never did, and therefore could have no execution for the tocher, whose term of payment was suspended on that event.

ANSWERED, 1*mo*, There was no necessity of implementing his part, seeing the marriage was dissolved by the wife's death, and no issue now remaining; and

so there was none to whom he could perform. *2do*, He was never put *in mora*, nor *mala fide*, by requisition to perform his part.

The Lords repelled this first reason of suspension, unless they subsumed that he was interpelled and refused.

The *second* reason was, Partial Payment: which being referred to the charger's oath, the first article he was interrogated on was anent a guinea and six dollars given him shortly after the marriage; as to which he confessed his wife received the same from her mother, the next morning after the wedding: And it was contended this behoved to be ascribed in part of payment of the tocher, 1*mo*, Because *debitor non præsumitur donare; 2do*, Though the mother gave it, yet it must be construed to be her husband's means, all accrescing to him *jure mariti.*

ANSWERED,—This can never be understood to be any more than a token gifted by a mother to a daughter; and a part of the mother's *peculium* and pose, and a part of the daughter's *paraphernalia. 2do*, This can never ascribe to the tocher, for it is not paid by the debtor, but only by his wife; neither is it received by the creditor, but by his wife; and so it is not *inter easdem personas.*

The Lords found this could be imputed in no part of the tocher.

The *second* article was, Some bedding and household furniture given him after the marriage: As to which he deponed, the same was gifted to him by his mother-in-law. OBJECTED,—This quality was extrinsic, and he behoved to prove it *aliunde* than by his own oath:

Which objection the Lords repelled; and found, *ex natura negotii*, there was nothing more usual and customary than for mothers to give their married daughters some plenishing, and which was never sustained in part payment of their tochers.

3tio, ALLEGED,—He had received £80 Scots, and sundry other things; which he confessed, but adjected this quality, That they were given him in satisfaction for keeping and alimenting Halyeards the suspender's son, for several months.

The Lords thought he had deponed very cautiously for himself, in asserting he got them *in solutum* of that debt, which seemed to make it intrinsic; for if he had acknowledged the receipt, but added, he owes me as much for his son's aliment, that would have been clearly extrinsic, and he behoved to have proven it; but the case being rigorous and unfavourable on the charger's part, he offered to prove the truth of the quality and alimenting by the suspender's oath.

The *fourth* article was Compensation; because I kept your daughter several months till she died. He deponed, That, after his wife's death, his goodmother would have away his daughter from him; and that there was no paction nor mention made for paying aliment, seeing he was willing to have kept his own daughter.

The Lords found there could be nothing claimed on this account, seeing it was the suspender's own desire to have their grand-child; and what they expended must be presumed to have been done *ex pietate;* it being usual to take home their grandchildren where their mother is dead, especially when young, and the expense inconsiderable; and though the father was alive, yet no transaction spoke of.

Many and frequent debates occur at the advising of oaths, whether the qua-

lities added be intrinsic and competent or not: Wherein the most general rule of determining is, where the party-referrer to oath picks out such parts and circumstances of the bargain, promise, agreement, or fact, as make for him, omitting the rest; in that case the party-deponer may declare the whole tenor of the affair, and what conditions and qualities were communed on, and the special terms on which he agreed, and the whole parts of the bargain; and these qualities will be intrinsic, and both necessarily and warrantably adjected: But if he confess the debt, and add,—"The pursuer owes me as much on another account," this is extrinsic, and resolves into an exception of compensation, and must either be proved *aliunde*, or action reserved to the deponer against the pursuer for constitution and recovery of it, as accords.

Vol. II. Page 96.

1700. *February* 29 *and June* 18. GEORGE SUITY *against* ROBERT HEPBURN.

February 29.—GEORGE Suity against Robert Hepburn, brother to Beinston, who founded on a promise, made by the said George, to quit omissions in the tutory; and he having deponed *negativè*, Robert urged a reëxamination, because he had erred *in jure*, in not considering that the words he used,—"I am willing to give you down Elphiston's debt," &c. implied a promise; but thought it only a communing. *2do.* He craved allowance of a transaction he had made with Balnagoun.

ANSWERED to the *first*,—After one has denied in general, there is no more room for particulars, else perjury might be inferred. As to the *second*, Though he had an act of the Lords, yet that was no sufficient warrant to transact, these being impetrated *periculo petentis*; and so cannot defend against the minor.

The Lords repelled Robert Hepburn's defences; whereupon he closed this winter session with an appeal to the Parliament.

Vol. II. Page 95.

June 18.—Robert Hepburn having, on the last of February 1700, entered his protestation to the Parliament against the Lords' sentence; and being charged in the vacance thereon, he gave in a bill of suspension, which he obtained passed, on his finding sufficient caution; which he not being able to find, gives in a bill to the whole Lords, craving they would allow it to pass on juratory caution, and his consigning a disposition, in the terms of the Act of Sederunt.

It occurred to the Lords, That he having appealed to the Parliament, the cognition was devolved to them; and they could not stop execution of their own sentence, unless he renounced his appeal; or, *2do.* That he sought suspension on obedience offered; or, *3tio.* That the reasons of suspension were emergent and supervenient since the decreet; and therefore the Lords recalled the suspension, and took off the sist of execution, and allowed the charger to go on in his diligence.

Vol. II. Page 97.