1670. *June* 29. ——— *against* MACCUB and his SPOUSE.

THIS Maccub charges for eight bolls of beer, or the price thereof; which the suspender is decerned to pay by a decreet before the sheriff of Dumfries. The reason of suspension and reduction is, that the said decreet is null, being in absence; for though a procurator compeared, yet he had no mandate in writ. But the decreet is likewise intrinsically null, seeing the claim is proven by witnesses cited out of another sheriffdom, without letters of supplement, or rather witnesses *ultraneo comparentes:* and one of them, being the party who sold the beer to Maccub, and so (the same proving insufficient) by reason of the warrandice wherein he was liable, might gain or win in the cause, could nowise be witness; which by the decreet appears to have been proponed, and yet was repelled. On this reason he being reponed, he offered him to prove that the said eight bolls being given to him by the chargers as to a maltman, he told them the same was altogether rotten and insufficient, and that he could make very little good malt out of the same; they bade him make it upon their hazard; they should seek no more nor what he could get of it. *Item,* offers to prove by famous maltmen in the town of Dumfries, who saw the beer before he put it in the steep, and who said that it was nought.

This his intimation of the insufficiency thereof, at the time he received it, was found relevant and admitted to probation.

Weimes and Dickson.

Advocates' MS. No. 44, *folio* 77.

1670. *June* 29 and 30. ROBERTSONE, Minister of Auchterhouse, *against* The EARL of KINGHORNE, Mr. ROBERT HAY of Dronlaw, and OTHERS.

June 29.—The Earl of Kinghorne (as coming in the place of the deceased Earl of Buchan,) being charged at the instance of Robertsone, as minister at the kirk of Auchterhouse, and parson thereof, for the parsonage and vicarage teinds of the same;

SUSPENDS,—Because the Earl of Buchan being patron, and having neglected to present within the six months prescribed in law, the bishop of Dunkeld, *jure devoluto,* presented this charger; and so could present to no more than what the ministers at that kirk of before were in use to receive; but, *ita est,* it is offered to be proven they have ever been in use to serve for a modified stipend, (though no locality can be produced,) and were never presented to the parsonage.

It was ANSWERED,—That such a use *non relevat,* unless the suspender propone on some right, by tack or otherwise, in his person, to these teinds, from the parson (for it was a parsonage) or other titular.

My Lord Stair inclined much to find, that *jus devolutum* (as this was) could reach no farther than to what the ministers of that place were in use and possession of before; seeing *nihil novi juris tribuit:* although it was answered, The bishop, *jure devoluto,* might present to all to what the patron might; but the

patron might have presented to the whole parsonage and vicarage. Yet he was content to give them the Lords' answer on it.

Act. Charger, Lermont and Lockhart. *Alt.* Spottiswood.

Advocates' MS. No. 42, *folio* 77.

June 30.—In the foresaid cause of the minister at Auchterhouse against Mr. Robert Hay of Dronlaw and others, the Lords found it not worth the taking to interlocutor about the *jus devolutum*, and therefore found that the Bishop *jure devoluto* might present to all which the lawful patron might have presented to. Yet where he sought six chalder of victual, as the parsonage and vicarage teinds, yearly, for the space of eight or ten years; the Lords assoilyied the defenders therefrom, viz. from all bygones, in respect of their *bona fides* to continue the former use and custom; but find the minister has right to the haill parsonage in all time coming.

Advocates' MS. No. 46, *folio* 77.

1670. *June* 30. Anent Bonds of Presentation.

One being charged on a bond wherein he was bound either to sist another at such a day, or to pay such a sum, *nomine pœnæ;* he suspends that he must be liberate from that bond, (though in the same he seemed to renounce *omnibus casibus fortuitis,)* because he offers him to prove that the party whom he should have sisted, was sick of a fever, and not able to come out of a bed at the time, and none is tied to things impossible. This was found relevant.

Vide infra No. 58, *July* 2, 1670.

Act. M'Kenzie. *Alt.* Lockart. *Advocates' MS. No.* 47, *folio* 77.

1670. *June* 30. The Bishop of Ross *against* Donald Fouller.

The Lords would not sustain this as a relevant reason of reduction of a bond: That it was granted by one taken with caption, and by reason of sickness upon his body unable to go to prison, (all which the very bond narrated;) since that is *metus justus et licitus*, being done *authore prætore.* Yea, they found a man being charged with horning on a decreet, and taken with caption, and then, in the hands of the messenger, granting such a bond, that the said bond was a homologation of the decreet: though a man cannot be properly said to homologate but where he has a free consent, which is not here. *Vide L.* 22. *D. quod metus causa; et Cragium, pagina* 127.

Act. Anderson. *Alt.* Seaton. *Advocates' MS. No.* 48, *folio* 77.