

sterling was to be disposed of by the king's appointment, and so not to Perth's own use, (but for the missionary priests, as is supposed,) yet Perth must refund it, unless he instruct how he employed it; which they dare not do, in regard the supplying seminary priests, to pervert the nation, is treason.

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1694. *June 19.* BOWER *against* BAILIE FYFE and ROBERTSON.

IN a cause, between Bower, Bailie Fyfe, and Robertson, it fell to be considered, if Bailie Fyfe's oath could be summarily advised as plainly negative; and next, if the quality was intrinsic, or behoved to be proven *aliunde*. The case was, He had charged on a bond of 200 merks. The reason of suspension was, It was for a fine imposed for a delinquence of theft, which he componed for that sum; and so it belonged to the town, and their treasurer behoved to uplift it. The Bailie depones, That the true cause of the bond was not borrowed money, as it bore, but a fine; and that he, by the rest of the magistrates' warrant, applied it to some pious uses, as is very usual, without having any writ to instruct it.

Yet the Lords found this quality extrinsic, and that his oath could not prove he had warrant for his application and payment; but rejected it, unless he prove it by the magistrates then in the office with him, or otherwise. For the Lords thought,—*1mo*. It was a transacting and huddling up of crimes, to commute corporeal punishment into money, contrary to *S. C. Turpilianum*. *2do*. The money being the town's, he should not exoner himself by his own oath.

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1694. *February 2 and June 20.* SCOT of MALLENY *against* SIR JOHN GIBSON of PENTLAND.

*Feb. 2.*—ARNISTON reported Scot of Malleny against Sir John Gibson. The Lords found, though Scot refused to debate on Sir John's declarator of molestation, and there was a protestation against him for not insisting, yet he ought still to be reponed to insist in adducing his probation as to the meiths and marches, he first paying Sir John's expenses in the cognition already taken; but superseded to give answer to the farther debate,—*viz.* that he had a decreet of perambulation, clearing the marches in 1620, with their answer, that Pentland had prescribed a part of that, by forty years' possession since, and the reply of interruptions, both *via facti et juris*, and by minorities, and by one tenant's possession of both the roums, &c. till they were farther heard. *Vol. I. Page 600.*

*June 20.*—In the action of molestation, between John Scot of Malleny and Sir John Gibson of Pentland, it came to be debated, If it be a sufficient interruption of the prescription, that one tenant, for several years, possessed both heritors' lands. Many thought, that a joint promiscuous possession by a tenant could be beneficial to neither, *nec prodesset nec obesse*, and could not be counted

to any of them, but subducted from the years of prescription ; which is odious. But, in regard the preparative was of importance, it was ordained to be farther heard.

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1694. *June 22.* PRINGLE of RENNISTON *against* JAMES RAIT, Merchant in Edinburgh.

IN the charge, at Pringle of Renniston's instance, against James Rait, merchant in Edinburgh, and his bill of suspension, reported by Crocerig, the Lords repelled this reason, That he offered to prove he entered all his goods at Kelso, and yet the *transire* he got did not contain the whole, whereby the goods, not mentioned, were seized by the waiters at Edinburgh ; and the bond being for the custom of these goods, he ought to have deduction effeiring to his damage.

The Lords refused to pass the bill, and found it not probable by witnesses, but only by Renniston's oath or writ.

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1694. *June 23.* LORD JOHN HAMILTON *against* SIR HUGH CAMPBELL of CALDER, &c.

THE Lords having rejected an article of 5600 merks, alleged paid by Calder, as cautioner, in regard it was instructed that the principal tacksman had paid it before ; and he being only a cautioner, should have known that, and not have paid till he had informed himself, or got an incident diligence for proving it ; and the principal was not obliged to intimate his having made payment to him : a bill was given in against this interlocutor, by Calder ; and, founding upon the common law, *l. 42. D. de R. J.* that *fidejussores eorumque hæredes justam ignorantiam allegare possunt* ; and *l. 29. D. mandati* is positive that the debtor ought to have acquainted his cautioner that he had paid, that he might not be ensnared ; and *Mavius, Decis. Lubec. anno 1655*, shows it was so decided there.

The Lords adhered ; reserving his recourse against Dumfermline, who received twice payment, as accords ; seeing the cautioner's second payment could not be said to be *bona fide* made.

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1694. *June 26.* ANDREW CHALMERS *against* ROBERT KER.

MERSINGTON reported Andrew Chalmers, against Robert Ker, in Dysart. The Lords adhered to their former interlocutor, and found the minute of contract obligatory ; and that the craving the pursuer's oath of calumny supplied the nullity of the not-designation of the writer and witnesses, if he acknowledged the subscription ; and that a minor, with his curators, might lawfully dispone lands, unless he could subsume lesion.—See Durie, *2d February 1630, Hamil-*