

1695. *January 25.* JOHN BETON of BLEBO *against* PATRICK SIBBALD and JEAN JOHNSTON.

ARNISTON reported John Beton of Blebo against Patrick Sibbald, and Jean Johnston, his mother, about Falconer of Kincorth's Lady's right to the lands of Paxton. The Lords found the bond, given to Hume of Wedderburn, superior of these lands, for 2000 merks, and assigned to Blebo, whereon he had adjudged, was conditional; and the condition not being declared before the leading of the adjudication, the same was so far a nullity as to restrict it, and cut off all its accumulations and penalties. Many of the Lords thought it *simpliciter* null, wanting a previous declarator; but, in regard it now appeared that the condition was purified, therefore they mitigated the rigour, as they had done formerly in Haly and Colvil's case, and in Humby and Kingston's, where co-creditors were competing. But they found it no nullity, that they had adjudged lands which were appraised before; because the act 1672 seemed to leave that optional to the creditor. And also found, the want of allowance was no nullity of the adjudication, but only a ground of preference; and that here there needed none, because the superior voluntarily entered the adjudger.

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1694 and 1695. JAMES SCOTT of BOWHILL *against* ANDREW KER of LITTLEDEAN.

1694. *February 6.*—BETWEEN James Scot of Bowhill and Andrew Ker of Littledean, in a count and reckoning for the tack-duty, the question was, On whom the loss or hazard of the bygone rests, lying in the tenant's hands, should fall; seeing Littledean had dispossessed him before the expiration of his tack, and arrested the rents, and caused the tenants suspend against Bowhill; and so he was hindered in the uplifting of them by Littledean himself.

The Lords, having considered that the rests given up by Bowhill as owing, were very large,—*viz.* £9000 Scots; and that, *quoad* years long preceding his being dispossessed, he was *in mora*, not having *tempestivè* sought them in,—they found he ought to have allowance of the rests due the two immediate years preceding his dispossession; and that these behoved to fall upon Littledean, because Bowhill had not a competent time for in-gathering of these; but, *quoad* the rests of preceding years, that these behoved to fall to Bowhill's own share, and he liable to count for them; as also, for what he was in the natural possession of, and had in mains: and found, that Littledean behoved to ascribe what he had intromitted with of these rents, at his entry to the possession, to his bygone rests, to exoner Bowhill *pro tanto*, and not to his current rent; and for that effect ordained his discharges to be produced, that it might appear for what rent they were granted.

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*February 28.*—In the action between Ker of Littledean and Scot of Bowhill, mentioned 6th February current, the Lords found, Seeing the advocate only offered to improve the precept of warning made use of by Littledean, as false, there was no need to cause Bowhill consign; though this may be a method to evacuate all consignations where improbation is proponed by way of exception,

by the king's advocate's insisting only *ad vindictam publicam*; and so he is not bound to consign. *Vol. I. Page 618.*

1695. *January 25.*—James Scot of Bowhill against Andrew Ker of Littledean, mentioned 6th February 1694. The Lords found the intimation made by Littledean to Bowhill, at Sneip, not sufficient,—Bowhill proving he had not his domicile there, but dwelt with his wife and family then at Kelso: but found his voluntary removing from Littledean's lands at the Whitsunday, by leaving the houses void, and taking off his bestial, probable *prout de jure*; though some thought it only probable *scripto et juramento*, as being to take away a written tack. But they also, before answer, allowed Bowhill to prove that his removal was only from one roun to another, for better grazing; that the Lords might see *quo animo* he removed, whether in obedience to the warning or not. *Vol. I. Page 663.*

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1695. *January 25.* MR WILLIAM CARSTAIRS, the King's Chaplain, *against* MR JOHN FRASER, Minister at Glencorse.

CROCERIG reported Mr William Carstairs, the king's chaplain, against Mr John Fraser, minister at Glencorse, about 140 merks, as the prebendary-fee due to an organist of the chapel-royal. Mr William claimed it as part of the emoluments of that chapel, gifted to him by the king. Mr John sought it as annexed to his stipend in 1649.

The possession being unclear, the Lords granted a conjunct probation, to either party, to prove who possessed it before the year 1637,—the bishops being restored, by the Act of Parliament 1662, to all they were in possession of in 1637; and how it has been possessed since the restitution of episcopacy in 1662. *Vol. I. Page 663.*

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1695. *January 25.* MR WILLIAM CRAWFURD of DALEAGLES *against* The RELICT and CHILDREN of LIEUTENANT-GENERAL DOUGLASS.

HALCRAIG reported Mr William Crawford of Daleagles against the Relict and Children of Lieutenant-general Douglass, for repetition of 2000 merks, paid to him as a fine for church irregularities. The question was, If the Session, or the Commission of Parliament for fines and forfeitures, was competent?

The Lords found it not competent before themselves. Then ALLEGED,—They claimed it as *indebite solutum*, from the principles of the common law: but that *medium concludendi* was not libelled. *Vol. I. Page 663.*

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1695. *January 29.* STRAITON of LAURISTON *against* ALEXANDER ARBUTHNOT of KNOX.

THIS was a reduction of a certification in an improbation, *1mo.* Because it