

in a bill of suspension, containing a relaxation and charge to set at liberty, on thir reasons, That his tack-duty was all exhausted, and paid to the minister, either for his stipend or for Kirklandhill's share and proportion of the stent laid on for repairing his manse. And for the 300 merks due by his bond, the charger had maliciously and unnecessarily taken assignation thereto without an onerous cause, and was more than paid thereof, by pointing his household furniture and plenishing. *2do*, The imprisonment was unwarrantable, being by a messenger deposed by the Lord Lyon, who could not legally apprehend him: and he had taken instruments thereon.

ANSWERED for the charger to the *first*,—That, since these payments, they had fitted an account in March last, whereby Dewar, after allowance and deduction of all his partial payments, acknowledges he is yet resting of the tack-duty £71 : 11s. Scots. And, as to the pointing, he opposes the execution and apprehension; which does not amount to near the half of his sums. To the *second*,—He is not concerned in the messenger's deprivation, never being intimated to him; especially seeing he often deprives them for no malverse in their office, but only for not paying in their dues to him. And it is enough if he is holden and reputed a messenger to validate his acting; like Barbarius Philippus, *l. 3, D. de Offic. Prætor.* *2do*, There was a concurring messenger along with him, against whom there lay no such exception.

The Lords found they could not summarily set him out, but recommended to the Ordinary to deal with the charger to restrict his sum to what was justly due, and to accept of caution; which Dewar offered him upon his liberation; and, if he did not consent, then to discuss the reasons on the bill.

*Vol. II. Page 461.*

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1708. *November 9.* COLONEL JOHN BUCHAN of CAIRNBULG *against* GEORGE LEITH, his Tenant.

COLONEL Buchan having bought the barony of Cairnbulg from the Lord Fraser, in 1703, he, in 1707, pursues Leith, one of his tenants, in his own baron court, and takes out a decret against him for £344 Scots: and having thereon obtained a decret of authorization against him before the sheriff of Aberdeen, conform to the rollment of the baron court, and having charged thereon; he *SUSPENDS*, on thir reasons, That, in the baron decret, he was both judge and party, and in the sheriff's decret there was manifest iniquity in not allowing his damages and deductions to be proven; and which he now repeats by way of declarator and reduction,—That the Colonel deprived him of his barn, by pulling it down when he had his corns in it, by which, he having no other place, he was forced to remove it to the barn-yard, and thresh it out there, in the open air, exposed to wind and weather; by which he was a considerable loser. *2do*,—For a whole summer he led sea-ware to a piece of ground, to dung it, and had 14 horses constantly employed therein; and, when he came to till it, his master stopped and interrupted him, whereby he lost a good crop; by which hardships (the like whereof he alleged were not upon record to be paralleled,) he was lesed in more than £400 Scots; for liquidating whereof he had raised a declarator.

ANSWERED,—The tenants' clamours have drawn out his pretended reasons to a great length, but they are utterly void of all substance: For, as to the *first*,—He had no right to that barn, but had all other conveniences and accommodations necessary; and it was nothing but absolute necessity that made the Colonel take it down, it being in danger of falling and becoming wholly ruinous. And, as to the *second*,—He was expressly restricted by his tack to labour according to old use and wont: But so it is, this piece of ground is only a light benty surface of a loose sandy ground on the sea side; and, if tilled, would spoil all the neighbouring land, by the tempestuous blowing of the sea in that part. So his damages are imaginary, and cannot, being illiquid, stop his master's clear liquid charge for his rent, which is not so much as denied; but must be reserved to be instructed by way of process, as accords; seeing they consist *in facto*, and cannot be instantly verified.

The Lords thought, that tenants could not be obliged to pay their rents, where they had clear grounds of retention on account of damages arising from the very subject by which they are to pay their rent, though they cannot instantly verify them, as consisting *in facto*; as here the loss he had by wanting the barn and by being stopped from tilling his land: and, therefore, they turned the decreets into a libel, and allowed the tenant all his defences, and to get terms to liquidate his damages, in his declarator, here repeated *incidenter*, before they would decern him to pay his rent: reserving, till the conclusion, to consider where the calumny lay, that the other party's expenses might be modified accordingly.

*Vol. II. Page 461.*

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1708. November 11. The UNIVERSITY of ST ANDREW'S *against* PROFESSOR CHARLES GREGORY.

I REPORTED the bill of suspension given in by Mr Robert Ramsay, Provost of St Salvator's College in St Andrew's, and the other professors and regents there, against Mr Charles Gregory, professor of mathematics in that University. King Charles the II. in 1668 mortified L.2000 sterling, to be paid out of the Exchequer, for augmenting the masters of that University's salaries, and, particularly, for a mathematic professor: But, the Exchequer withdrawing payment, the Parliament, in 1681, granted half a month's cess to the said college, to be employed and distributed at the sight of the Privy Council. And, accordingly, Mr James Fenton being presented to be professor of mathematics in 1688, both his gift and the Act of the Privy Council modified L.50 sterling yearly for his salary, out of the first and readiest of the rents of the lands purchased with the L.3000 sterling, as the foresaid half month's cess. And the Queen having presented Mr Charles Gregory to that professorship in 1707, he pursues Mr Ramsay and the other masters, as intromitters with the rents of the said lands, out of which his L.50 sterling is made payable, to refund the said sum, as his salary, for the year 1707, and the tenants for paying him in time coming; and obtains a decret *in foro* against them. Whereof the professors gave in a bill of suspension, on thir reasons, That the Privy Council, in 1695, had divided the said half month's cess amongst the masters; whereby the power given them by the Act of Parliament in 1681 was fully exerced, and they were *functi*, and had no more