

1694. *February 20.* WILLIAM MONTGOMERY *against* LORD BARGENY.

WILLIAM having got an assignation to a bond due by Bargeny ; when he is about to give him a charge of horning, Bargeny desires him to forbear, and, within a few weeks, he would pay him. After this, several months running, a creditor of the cedent's arrests in Bargeny's hands, and pursues a forthcoming ; wherein the arrester, as having done the legal diligence first, is preferred. William Montgomery insists against Bargeny on his promise. He defends, that he cannot pay twice ; and his promise must be understood *in terminis juris*, unless it be legally evicted from me by another.

ANSWERED,—I was put *in tuto* by your promise, not to intimate ; which, if I had done, I would have been unquestionably preferable to the arrester ; and you being *in mora*, in not performing your promise, by making a punctual payment, the intervening arrestment cannot excuse you.

The Lords, before answer, ordained Bargeny and Andrew Houston (whom he sent to move William to forbear,) to depone anent the terms in which the promise was made ; for, if William was damnified thereby, they ought to repair him.
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1694. *February 21.* DURIES, &c. *against* HELEN KINCAID in Borroustonness.

THE Lords found the tenants could not be holden as confessed upon their quantities, on a decret and execution that they were lawfully summoned : which the Lords found was not synonymous and convertible with " personally apprehended ;" seeing it was a generic word that comprehended also citations at one's dwelling-house.
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1694. *February 21.* JOHN COUPER and his SPOUSE *against* GARDEN of BELLAMORE.

THE Lords found, though the charger had showed his willingness to accept of the disposition to the rents of his lands, with a reservation of 300 merks to himself, aye and while he were paid of 2000 merks charged for ; yet, it not being performed to them *debito tempore*, they were not bound to stand to that offer now, after several years were elapsed : for, if he had got possession, he would have been near paid by this time, and now his estate is more incumbered. Therefore, the Lords found the offer, not being then implemented, the charger could not be forced now to accept of, or stand to it, unless his damage was first purged ; which was the want of the hail bygone annualrent, and a part of the principal, that would have been paid by his possession, if he had got it in time.
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