

ther, who was cautioner for Monro of Foules, compearance was made for Foules, the principal, who proponed a defence of payment of the whole bond ; and, for verifying thereof, produced three discharges, one dated in August 1648, bearing the receipt of the whole byrun annualrents, and of £987 of principal ; the second, bearing a receipt of 1000 merks, dated the 1st of December 1646 ; and a third, dated the 6th day of the said month, 1646, bearing, at the date thereof, and of before, to have received payment of the whole preceding annualrents, and of the sum of £1148 ; whereupon he inferred that the three discharges did amount to the whole sum in the bond.

It was REPLIED for the pursuer, That the two first discharges were included in the last, which was granted within six days after the second discharge, and the sum therein contained did amount to the two sums contained in the two first discharges. Likeas, the defunct Mr Francis Hay, being a right honest and understanding man, would have granted a full discharge of the bond, or have given up the same ; whereas, after the said last discharge, he did assign the sums now pursued for as a part of his daughter's tocher.

The Lords, notwithstanding, finding the matter unclear ; in respect the last discharge, which was posterior to the first two, did bear a receipt of money at the date thereof ; before answer, they did ordain the persons who did pay the sums contained in the two first discharges, and such others as knew what was done at that time, to be examined upon their knowledge if the last discharge was given in contemplation of money given at that time.

Page 103.

1670. *February 11.* BRUCE and CURATORS *against* JEAN JACK.

BRUCE, pursuing the said Jack, as executrix to her mother, for merchant goods alleged sold and delivered to her, extending to £150 sterling ; it was ALLEGED, That the action was prescribed, being for merchant goods, and not pursued for within three years ; unless the delivery were proven *scripto vel juramento*.

It was REPLIED, That the Act of Parliament did only comprehend merchants' accounts, where the goods were sold by retailers, but not where they were sold in gross, such as the goods libelled were ; it being offered to be proven that they were all delivered at two several times only.

The Lords did sustain the defence, founded upon the Act of Parliament ; which was general, [for] all merchants accounts : but, thereafter, the delivery of the goods being offered to be proven by the defender's tutors, who ought not to be looked upon as ordinary witnesses, their oath, *ex officio*, was ordained to be taken before answer.

Page 104.

1670. *February 15.* BROWN *against* LEVINGSTOUN.

DAVID BROWN, being infest in a tenement of land in Dalkeith, and having
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raised a reduction and improbation against Mr Alexander Levingstoun, wherein certification was granted; thereafter Gustavus Brown did adjudge the right of the tenement from the heirs of the said David, and pursue a wakening of the said improbation against the heirs of the said Mr Alexander Levingstoun.

It was ALLEGED for the defender, That the wakening could not be sustained, which is only when the pursuer and defender are living; whereas, here, they being both dead, there ought to be a transferring of the process, both *active* and *passive*.

It was REPLIED, That it was only necessary in personal actions for payment of debts and doing of deeds.

The Lords, notwithstanding, did sustain the defence, and found a necessity to transfer.

Page 105.

1670. February 18. MILLER, Schoolmaster of PRESTON-KIRK, *against* The TENANTS of HAILES and TREPRAIN.

IN a pursuit, at the schoolmaster's instance, against the tenants of Hailes and Treprain, belonging to the Viscount of Kingstoun, for payment of 16 shillings Scots, imposed upon every husband land, to be paid to the schoolmasters, by a stent agreed to and subscribed by the whole heritors; to which action the Viscount, being likewise called by order of the Lords, who declared that he would not oppose the pursuit: It was ALLEGED for the tenants, That they could not be decerned; because, the stent-roll being only subscribed by their master, it could not oblige them, they not being obliged by their tack to pay the same; and the imposition upon the husband land was not *debitum fundi*; neither was there any arrestment used. Likeas, some of the tenants were but lately come to the ground, and were pursued for many years preceding.

The Lords did sustain the defence; notwithstanding it was REPLIED, That all the rest of the tenants of the parish made payment, and that, their master being cited in this process, they might justly retain so much of their tack-duty.

Page 106.

1670. February 21. MACQUEEN *against* The COLLECTOR of the VACANT STIPENDS.

MACQUEEN, having gotten a sentence against the Marquis of Douglas, as is before mentioned, he was pursued, at the instance of the collector of the vacant stipends, for the half year's stipend 1669 years; wherein, having repeated that same allegiance,—That, albeit he was called to be minister at Edinburgh, yet he had served at the kirk where he was incumbent till March; and that, being only a stipendiary minister at Edinburgh, his wife and children can have no ann.

The Lords did sustain the allegiance, notwithstanding he had not served the full half year, but only four months thereof.

Page 106.