

that his agent had given his servant a dollar, to convey the information to him ; and that he would not allow his servants to take any money from the people. And though the king's advocate excused it, by terming it a common practice, yet he declared he would not suffer it.

The President and the Lords were silent ; and some of them appeared not to be much of the Chancellor's opinion.

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1687. *February 26.*—THE Lady Wemyss gains her cause against M'Kenzie of Applecross, mentioned 23d December 1684.

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1687. *February 26.* JAMES HUNTER, Treasurer to the Advocates, *against* DAVID DOUGLAS, Advocate.

MR James Hunter, treasurer to the Faculty of Advocates, having charged Mr David Douglas, advocate, to pay 500 merks yet resting of his entry-money, as coming in by a bill without examination, (for he had paid the other 500 merks ;) he gave in a bill of suspension to the Lords, pretending the act for 1000 merks had never yet taken effect, and was but *ad terrorem* ; and he would rather resign his gown, having but small employment.

The Lords stopped execution against him till the 1st of June.

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1687. *June 3.* JOHN HAMILTON *against* NINIAN LOWIS.

A CASE, depending before the Bailies of Edinburgh, was brought in before the assessors, and much agitated among the lawyers, between Ninian Lowis, apothecary, and John Hamilton, Duke Hamilton's bailie-depute in the Abbey, who had set a shop, in Edinburgh, to Ninian ; but he afterwards falling to be better provided *aliunde*, sets it to one Brown, who sold ale : and John quarrelled the sub-set on thir grounds :—*1mo*, That he has a cellar below, and this was *in æmulationem vicini*, and prejudged their change. *2do*, That tacks are *strictissimi juris* ; and so this not bearing to assignees, it was merely personal to himself ; and he could not put in another, else he might bring in a rebel, and so render him, the landlord, obnoxious to the hazard of law ; or set it to his enemy, or to one so negligent as might endanger it by fire. *3tio*, In the present case *electa est persona* ; and both Stair, *tit.* Tacks, and Craig, are clear, that they cannot sub-set the whole : for one may set off chambers, and parts of their house. ANSWERED,—If I pay the maill, you are not concerned : but here your condition is meliorated ; for you have both the tenant and sub-tenant liable for the maill ; and the axiom against sub-setting is only against assigning, which is a total denuding, and a freeing of the first tenant : but a sub-set is lawful ; and was so found 12th March 1686, betwixt Sir James Rocheid and Moody, sub-tenant to Haliburton and Borthwick ; though that tack excluded assignees, and was in country lands ; whereas this is *in prædiis urbanis*, where often the tenant is better than the landlord. *2do*, Stair adduces

no decision, but gives his own opinion. And the Roman law is clear, *l. 66 D. Locat. quod nemo prohibetur rem quam conduxit fruendam alii locare, si nihil aliud convenit*. And though *habitatio* be a personal servitude, and of a far stricter nature than *locatio conductio*, (which is our tacks and assedations,) *et bonæ fidei contractus*, though *stricti juris* as to transmission, yet *habitationem habentibus permittitur, non tantum in ædibus degere, sed etiam alii locare*; *l. 13 D. de Usu et Habitat. § 5, Institut. eod. tit.* And Sir George Lockhart was of opinion that a tenant might subset. See Stair, *2d January 1672, Lady Binny*.

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1687. WALTER SCOT of LETHAM *against* The EARL of MARISHAL.

*February 16.*—THE Lords advised a concluded cause at the instance of Walter Scot of Letham, against the Earl of Marshal, who suspended his bond of £9000, on this reason, that Sir John Scot had contravened the warrandice of his disposition, (for which the £9000 bond was given,) by making a prior right of the Stane of Benholm to Hercules Scot. ANSWERED,—He is only a consenter, which is but a *non repugnantia*, and he got no money from Hercules,—but the Earl got a renunciation of a wadset they had upon Urras; and if the Earl reclaim, they are content to reponer, and be reponed.

The Lords found this a contravention, but that the offer to reponer purged this contravention of the warrandice; and therefore found the letters orderly proceeded against the Earl. *Vide 9th June 1687. Vol. I. Page 448.*

*June 9.*—Walter Scot of Letham's charge against the Earl of Marishal, mentioned 16th February 1687, is debated of new; and the Lords adhered to their former interlocutor; but ordained the Earl only to denude with the burden of the rights, dispositions, and ratifications he had granted, as obliged thereto by his transaction with Sir John Scot; for the Earl of Marishal alleged it was impossible for him to reponer him, because *res non erat integra*, he being taken obliged to ratify rights which otherwise he might have quarrelled.

The Lords salved this in manner foresaid.

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1687. *June 10.* GEORGE MASTERTON *against* WILLIAM MASTERTON.

GEORGE Masterton, writer in Edinburgh, pursues William Masterton on the passive titles, for payment of a debt; who ALLEGED it was paid: and he having produced some receipts of the date of the bond of corroboration, the Lords refused to allow thir receipts, unless they had been posterior; especially seeing they had not appeared to give their oath of calumny, if they had reason to propose payment.

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