

1695. *November 30.* MARY BANNERMAN, Lady Findrassie, *against* ABRAHAM LESLIE.

ON a petition given in by Mary Bannerman, Lady Findrassie, against Abraham Leslie, her husband's heir, it fell to be debated among the Lords, Whether she could be holden as confest, because she refused to depone in the manner prescribed by law, swearing "by God;" but offering to declare the truth as in the presence of God, according to the custom of the Quakers, of which persuasion she was. It was argued, upon the one hand, That it had been constantly accepted of and received from these sort of people, and it was equivalent to an oath; and it were the persecuting of their conscience to force them otherwise; and it might ruin them if a malicious person raised a claim against them for 10,000 merks, and referred it to their oaths, if they were held as confessed for not swearing what they think prohibited by Christ's law. On the other hand, it was objected, This indulgence was to harden them in their error; and that our Confession of Faith was now a part of our law, being ratified in the Parliament 1690; and by it they were bound to swear: and this might encourage men to believe that, by this course, they might escape perjury; for, if a Quaker should declare what is false, he could not be processed criminally for perjury, because there was no interposition of an oath.

The Lords resolved to consider this case more maturely ere they should come to a decision; but, generally, the pursuers, of consent, allow them to depone in their own manner: So judges are seldom put to determine the precise point, If there be any law or practice permitting it. *Vol. I. Page 681.*

1695. *December 3.* The CREDITORS of SIR JOHN NICOLSON of that ilk *against* The CREDITORS of SIR WILLIAM NICOLSON.

MERSINGTON reported the Creditors of Sir John Nicolson of that ilk against the Creditors of Sir William Nicolson. The first claimed a preference *quoad* the lands of Cockburn's-Path, because Sir John, their debtor, died last vest and seased therein; whereas Sir William was never infest, but only bruiked the same as apparent heir. ANSWERED for Sir William's creditors, That they had supplied the want of his infestment, and done all the law required, by charging Sir William's son to enter heir in special to Sir John, his uncle, and had thereon adjudged; and the act cited gives only a preference for three years.

The Lords found them all in a like case, and brought them in *pari passu*, conform to their diligences. *Vol. I. Page 682.*

1695. *December 5.* GEORGE MACKENZIE of ROSEHAUGH *against* SIR WILLIAM SCOT of HARDEN.

PHILIPHAUGH reported the bill of suspension given in by George Mackenzie

of Rosehaugh, against Sir William Scot of Harden, of a caption taken out against him on the decret of Parliament, ordaining him to restore the £1500 sterling of fine gifted to the deceased Sir George Mackenzie, his father, imposed upon Harden in the late times, because his Lady would not come to church. The reason was, That he, being a pupil only of nine years of age, both the common law and that of all nations exemed him from being imprisoned for his father's debt; because, restraint being penal, a pupil, who is not *doli capax*, cannot incur it during his pupillarity, which continues till fourteen; and, if this were allowed, then tutors, who are generally *proxime successuri*, might let their pupils be incarcerated, that, by its *squalor*, the child coming to die, he may succeed; and, if one of nine years old can be apprehended, why not one of two or three, &c.

The Lords considered this was a decret of Parliament, which use not to be suspended by the Lords of Session except upon obedience; yet, having read the decret, they found it did not ordain all sort of execution to pass, but only in common style; and this was not to suspend the Parliament's decret, but only to regulate and explain the manner of executing the same, which they might do by adjudging, poiding, arresting, and all other sort of diligence; but the putting it to execution, by apprehending the child's person, was against the common law: therefore they found no such caption could pass against him during his pupillarity. But, to pay all just deference to the Parliament, they made it alternative that they sisted execution by caption till his pupillarity expired, or the sitting of the next session of Parliament, which of them first occurred; and, that they might proceed *causa cognita*, they ordained the time of his birth and age to be proven, that it might be known when this sist would expire by his attaining the age of fourteen. But, if the Parliament should happen to sit before that time, then they were to apply to them to stop caption against him during that time, wherein all laws gave him a personal privilege on the accounts foresaid, as also that the education of youth might not be impeded. See the case recorded by Haddington and Dury, *25th June 1624, Scarlet against Somerville*, where the Lords, on sundry specialties, stopped a caption against a girl minor, though past fourteen, and that for the space of a year, but prejudice of all other executions.

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1695. *December 10.* ANDREW HOUSTON *against* SIR WILLIAM MAXWELL of MONREITH.

A BILL being given in by Andrew Houston, against Sir William Maxwell of Monreith, complaining, That, though he had bought Sir Godfrey Mackulloch's lands at a roup, and that he was one of the preferable creditors for £7000, yet he refused to pay him, on the pretence that he had not got a sufficient progress of the rights and evidents of the lands delivered to him.

The Lords considering this as a general case concerning the whole lieges, and all purchasers by roups, they desired to hear it in their own presence; and accordingly, being debated this day, the inconveniences on both hands occurred