

Sir Alexander Naper, sets a back-tack of the same to Sir Alexander, for payment of £700 yearly. Sir Alexander, in March 1629, causeth one of his tenants give bond to one Gray, at the West-port, for payment of 30 bolls of victual, betwixt Yule and Candlemas following. Sir Alexander being dead, Mr John, in September, arrests the same victual in the tenant's hands, for payment to him of his tack-duty. The question coming betwixt Mr John and Gray, which of them should be preferred; Mr John alleged, He, being heritor, might have recourse to the ground for payment of his duty, and ought to be preferred to the other, having arrested in due time, and the farms being yet extant in the tenant's hands. Gray answered, He ought to be preferred in respect of his bond, and Mr John could only have personal action against Sir Alexander's heirs and executors, for payment of his tack-duty; seeing he could not be respected as heritor, but only as naked tacksman. The Lords found that the heritor, notwithstanding of the back-tack, was in no worse case; but that the land was affected really with the burden of the tack-duty: and so preferred Mr John; and likewise freed the tenant of his bond to Gray, seeing it was only given for his farms.

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1630. *March 11.* JAMES FRASER *against* JOHN BANE.

JAMES Fraser, having arrested 12 score bolls victual in the hands of John Bane, which appertained to Mr Ronald Bane, his debtor, convened John Bane for making the same forthcoming, and referred the verity of the debt to his oath; who being holden as confessed, decreet was given against him. Afterwards being charged, he suspended upon a reason of compensation, That Mr Ronald was owing 1200 merks to him, which he had paid as cautioner for him, and therefore had the right of retention of as much. The Lords would not sustain the reason of compensation, but found the letters orderly proceeded, in respect that the matter being referred to the defender's oath before, he might have deponed at that time, and freed himself *pro tanto*; and, because he was *contumax* at that time, they would not restore him now.

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1630. *March 24.* The SHERIFF of TEVIOTDALE *against* LORD CRANSTON.

IN a declarator of property pursued by the Sheriff of Teviotdale against the Lord Cranston, the pursuer libelled his interest as heir, at least apparent heir to his fore-grandfather. As apparent heir, could not be sustained to pursue a declarator upon: For heir, there was nothing shown, only he showed where he was heir by progress to him, and successor *in rem*. It being alleged, No process, because he showed not where he was heir to his fore-grandfather, as was libelled;—the Lords suffered him to mend his summons with these words—“at least successor *in rem*,”—which was in effect to libel a new title.

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