

1693. *February 22.* PATRICK DUNDAS of Breastmilm *against* WEDDERBURN of Gosford.

THE Lords entered to advise that cause pursued by Patrick Dundas of Breastmilm against Wedderburn of Gosford; and in regard of the bar of a decret *absolvitor in foro*, and also that it was a dubious point, if a creditor, who has two securities, by arrestment and apprising, and debars others thereby, and gets payment by one of them, if he shall be liable to another creditor whom he debarred, where the subject becomes insolvent *medio tempore*, and he did not intimate to them to pursue them; therefore they recommended it again to be agreed.  
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1693. *February 8.* The EARL of TARRAS *against* SIR JOHN DEMPSTER of Pitlever, and the EARL of SEAFORTH.

1693. *February 8.*—THE Lords advised that other great cause at the Earl of Tarras's instance against Sir John Dempster of Pitlever, and the Earls of Seaforth. The first vote was, whether presently determine, or remit it to the commission of Parliament; and determine, carried it. Then the second vote was stated, whether Pitlever's payment being in obedience to a decret against him, (though there was no charge of horning, nor caption upon it,) was a *bona fide* payment, in the terms of the act of Parliament in 1690, anent fines and forfeitures, requiring that the payment shall be upon distress. And the Lords having considered the decisions in *Dury* 1627 and 1623, and the circumstances of the time when Pitlever paid it to Seaforth, they found the decret a sufficient distress; seeing it was not easy for him then to have got it suspended. In the third place, it was stated, seeing Pitlever by his oath had declared the way he paid Seaforth the 20,000 merks, was by 7000 merks in money, and by assigning him to two rights, one upon Seaforth's own estate, and another on the Earl of Mar's; whether what he gave Seaforth, in numerate money, was *bona fide* payment in the terms of the act of Parliament. And it was found to be so, and that Pitlever ought to be assoilyied from this pursuit of Tarras's *quoad* that. And then fourthly, it being queried, whether what Pitlever gave Seaforth, on the two transactions, was also to be reputed as payment, so as to liberate Pitlever, and put Tarras to recur only against Seaforth; the Lords found, though generally, transactions had the force of payment, and was equivalent to money; as if one pay his debt by delivery of corns, cattle, or other goods; yet here Seaforth not being an accessible debtor, therefore they refused to sustain these transactions, so as to put Pitlever in the case of the exception of the said act of Parliament, and to exclude Tarras; and found him liable for that, as well as the two years and a half's annualrent given him down. But decerned Seaforth to repon him again to the rights he had conveyed and transmitted by these transactions; which being alleged to be extinct, yet the Lords, by the restitution of Tarras's forfeiture, found them now to revive. Only a difficulty occurred,

that the right from Pitlever was taken blank in the assignee's name, so *non constat* if Seaforth's name was filled up therein or some others', and they behaved first to be called ere any thing could be decerned against them.

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1693. *February 22.*—In the action pursued by the Earl of Tarras against Sir John Dempster of Pitliver, mentioned 8th current, the Lords, after they had many times repelled his declinator, and given several interlocutors in the cause, they *ex proprio motu* remitted it to the Parliament, and its committee: in respect of sundry insuperable difficulties emerging, which strict law could not extricate; but a parliamentary power, not tied to precise law, might. *Vol. I. page 563.*

1693. *February 22.* PROCURATOR FISCAL of Pittenweym, *against* ROBERT MERCER, &c.

THE Procurator-fiscal of the town of Pittenweym against Mr. Robert Mercer, and sundry of the burgesses, whom they fined for opposing the entry of Mr. Patrick Couper, the Presbyterian Minister. The Lords found a rabble had gathered on both sides, and that it being a riot and unlawful convocation, it was proper for the Privy Council; and they remitted it to them.

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1693. *February 22.* JAMES MUIRHEAD *against* the MERCHANTS of DUMFRIES.

THE Lords found George Johnston's assumption being without consent, it could deduce nothing of his 12th part; and adhered to the former interlocutor, whereby he he got 6 *per cent.* for his stock since the dissolution of the society, with 3 *per cent.* more, *nomine damni*, not only for their trading with his stock during that time, but also because they had unwarrantably thrust him out of the copartnery, and abstracted and vitiated the books by which he could prove his charge: And as for the interval between the last fitted account in 1685, and the dissolution in 1687, they allowed him to prove what was the greatest profit they made; but with this quality, that if there was loss, then he must also bear his share of it, else it would be *societas leonina*: And found the L.78 Sterling due by his father, as cash-keeper to the society, must not be deduced as a debt now *ab hoc momento*, but must default of his stock *pro tanto* at the time of fitting the account.

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