1664. *July* 19. SIR LAURENCE SCOT *against* Lady SHENALTOUN.

No 12.

IN an act of litiscontestation, betwixt Sir Laurence Scot and the Lady Shenaltoun; a defence of payment being found relevant, *scripto vel juramento*, for Sir Laurence, and not having cited the Lady to give her oath, nor produced any writ, the term was craved to be circumduced.

THE LORDS did not circumduce the term; but found that the pursuer should have been still ready to produce his client to depone, if the defender made choice of his oath.

Stair, *v.* 1. *p.* 217.

1667. *February* 13.
LORD JUSTICE CLERK *against* RENTOUN of Lambertoun.

No 13.
An oath of party, relative to accounts, does not preclude investigation of the fact.

THE Lord Rentoun, Justice Clerk, pursues Rentoun of Lambertoun, as heir to his father, for count and payment of his rents, woods, and planting, intromitted with by Lambertoun, in the beginning of the troubles. It was *alleged* for the defender, Absolvitor; because, by the act of indemnity, the lieges are secured, as to all things done by any pretended authority for the time: *Ita est*, The pursuer being sequestered, the defender's father meddled by warrant from the Committee of Estates, and made count to them, as appears by his account produced, which is balanced by the Committee; 2*do*, The said account bears, that Lambertoun made faith that it was a true account, nothing omitted in prejudice of the public; after which he could not be questioned, either for any thing in the account, or for any thing omitted and not charged. The pursuer *answered*, That the act of indemnity contains an express exception of all persons that meddled with any public monies, and had not made count therefor, that they should yet be accountable; 2*do*, The account produced contains two accounts; one in *anno* 1641, another in *anno* 1643. The first is not approved by the Committee, but adjusted by three persons, who were no members of the Committee, and whose warrant is not instructed; and the second account is only approved, wherein the charge is a rest in the tenants hands of the former account, and the oath is only adjected to the second account, which cannot import that Lambertoun omitted nothing in the first account, but only that he omitted nothing in the second, and his oath is only to the best of his knowledge, and can import no more, than the oath of an executor upon the inventary, which excludes not the probation of superintromission. It was *answered* for the defender, That the second account being the rest of the first account, the approbation of the second must approve both, and the approbation is sufficient warrant for him to intromit, and the auditors to count with him.

THE LORDS repelled the defence upon the act of indemnity, in respect of the foresaid exception contained therein; and likewise found, that the oath subjoined to the second account, could not exclude the pursuer from insisting for the defender's father's intromissions omitted out of the first account, and wherewith he charged not himself; but found that the defender was secure by the act of indemnity, so far as he had charged himself with, and counted; and found that he was not obliged, after so long a time, to instruct his commission, or the warrant of the auditors, that fitted his accounts; but that the approbation was sufficient to instruct the same.

No 13.

1667. *February* 23.—THE Lord Rentoun insisted in the cause against Lambertoun, mentioned the 13th February 1667: He now insists on this member, offering to prove, that umquhile Lambertoun, by his commission or bond, was obliged to the Estates for exact diligence; and the pursuer being now restored, he is liable to count to him in the same manner as to the Estates, not only for his intromission, but for his negligence, whereby he suffered other persons publicly and avowedly to cut the pursuer's woods of a great value, and did noways stop nor hinder the same, nor call them to an account; 2*do*, He himself intromitted with the said wood, at least others by his warrant; which warrant must be presumed, in so far as he having a commission, and obliged for diligence, did not only suffer the wood openly to be cutted, but applied a part thereof to his own use, and was oft-times present when it was a cutting by others. The defender *answered*, *first*, That he could never be liable to the pursuer for his omission; because, his only title was his right of property; whereby the defender was liable to restore to him what he had intromitted with, and not counted for, but for his obligement to do diligence, it was only personal granted to the Estates; and, albeit they restored the pursuer to the estate, they never assigned him to that obligation; 2*do*, The defender is secured by the act of indemnity, except in so far as he intromitted, and did not duly count, as was found by the former interlocutor in this cause: And, as to the second member, it was *answered*, That the defender being only accountable for his father's intromission not accounted for, albeit he had given warrant to others, except he had received satisfaction from them, it is not his own intromission; 2*do*, Warrant or command is only probable by writ or oath, and noway by presumption, upon such circumstances, which presumptions are also taken off by others more pregnant, *viz.* that these woods were cut by persons in power and interest in the country, who had no relation or interest in the defender's father, whom he was not able to stop or hinder; and most part thereof was clandestinely cut and stolen away by meaner persons. It was *answered* for the pursuer, That he being restored, succeeds in place of the Estates, and as what is done by a *negotiorum gestor* without warrant, is profitable for those for whom he negotiates, so must this be which was done by the Estates. As to

No 13.

the act of indemnity, the meaning thereof can be no more than that parties who acted shall be in no worse case than they would have been with that party whom they followed. As to the second member, the pursuer *answered*, That what was done by others, by the defender's father's commission, must be his intromission, seeing it is all one to do by himself, or by another; and seeing it cannot be called omission, it must be intromission; *2do*, Though command or warrant is ordinarily probable by writ or oath; yet there are *casus excepti*, as whatsoever is done for any party in his presence, is by all Lawyers said to be "ex mandato, et inde oritur actio mandati, et non negotiorum gestorum;" so that the presence, or tolerance of a person not only having power, but being obliged for diligence, must much more infer his power or warrant; and, albeit he was not always present, yet the deeds being public, and near the place of his abode, it is equivalent.

THE LORDS inclined not to sustain the first member, both in respect of the act of indemnity, which bears in itself to be most amply extended, and in respect that the pursuer had no right to the personal obligation or diligence; but, as to the second member, the LORDS were more clear as to what was done in the defender's father's presence; but, in respect it was more amply proponed, the LORDS, before answer, ordained witnesses to be examined by the pursuer, whether or not the woods were publicly cut, and whether or not Lambertoun was at any time there present, and applied any thereof to his own use; and witnesses also for the defender to be examined, whether a part was cut clandestinely, and other parts by persons having no relation to Lambertoun, and to whom he used any interruption.

Stair, *v.* I. *p.* 441. & 450.

1673. *November* 28.
JEAN CAMPBELL and her Spouse *against* ALEXANDER CAMPBELL.

No 14.
Between conjunct persons, if a bond bear for borrowed money, the oath of party is sufficient to support the deed, but if there is a disposition bearing for an onerous cause, the onerous cause must be instructed, otherwise than by oath.

THE said Jean being provided by her contract of marriage with Donald Campbell to the half of the moveables that should belong to her husband at the time of his decease, and two hundred merks out of the first end of the other half, she did pursue the said Alexander for payment of the half of a legacy, which was left by the said Donald's father to him, and intromitted with by the said Alexander, by virtue of a disposition made to him by his brother. It was *alleged* for the defender, That he could not be liable, because by the disposition he did acknowledge himself debtor to him in a thousand merks, and for satisfaction thereof disponed to him the said legacy and moveables, which was lawful to him to accept of, being a lawful creditor as said is. It was *replied*, That the disposition being granted by one brother to another, the law presumes it to be fraudulent, unless that he can prove *scripto*, and otherways than by the said disposition, that his brother was truly debtor in the said sum; specially the