

1683. *January.* ANDREW AIKMAN *against* LEWIS CANT, &c.

FOUND that infestment, and possession upon a bond anterior to the granter's rebellion, attained *in cursu rebellionis*, either voluntarily or by diligence, before expiring of the year and day, was preferable to the liferent-escheat, as being a prior public right.

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1683. *January.* MAXWEL of NETHERYETT *against* STUART of SHAMBELLIE.

STUART of Shambellie having suspended, upon compensation, a decret for £300, obtained against him by Maxwel of Netheryett, and having, after an interlocutor sustaining the compensation, but before the pronouncing of sentence, beat the charger; he, the charger, insisted upon the Act —, Parl. 14, James VI, and craved the letters might be found orderly proceeded. Alleged for the suspender, That it was only the meaning of the said Act that the invader should not be allowed to propone any thing after the invasion; but it were hard to cut him off from compensation already sustained. Answered, The charger did industriously give the first provocation by injurious words, knowing the suspender to be a hasty man. Replied, The suspender must be cut off from his reasons of suspension; for the Act of Parliament operates as much as a discharge of the debts suspended on, so as they can never be the ground of any action in time coming, or sustained as a defence or reason of suspension in this process, and has not simply the effect of an absolution *ab instantia*, but extinguishes the litigious subject. The Lords having found, upon advising the proof, That though the charger uttered first some injurious words, the suspender gave the first blow with his staff, and so was the first aggressor: They found the pursuer's reply relevant, and that the suspender was cut off from his grounds of compensation founded on, and could not use them in any other process. *Vide* No. 934, [Strachan against Tolquhoun, January 1687.]

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1683. *January 6.* MR RIVEN and his CREDITORS *against* PATRICK KER.

IN a competition betwixt Edward Ruthven's Creditors and Patrick Ker, who had adjudged a right of annual-rent out of my Lord Callender's estate, belonging to Riven the common-debtor;—it was alleged for the rest of the creditors, That Patrick Ker could not have the fifth part more than his principal sum and annual-rents; because, 1. The subject of his adjudication being only an annual-rent, which, upon requisition will produce ready money; and so the reason in the Act of Parliament for allowing an additional fifth part, *viz.* that the creditor is forced to take land for his money, doth not hold. 2. The debtor offers payment of the sum adjudged for, within the legal of five years, which must cut off the claim of fifth part more; as redemption within the legal would

extinguish an adjudication or apprising of the whole lands. Answered, 1. *Non refert* whether the subject adjudged be land or annual-rent; for, if the debtor, upon requisition, should refuse to pay, the creditor is as little master of the money as if lands were adjudged, and the fifth part more is granted to creditors, not simply because they take lands for money, but also by way of penalty for the delay of their payment: for, as Stair observes, £100 is the usual penalty for 1000 merks of principal, which, with 50 merks of sheriff-fee, (that is the 20th part,) extends to 200 merks, the fifth part of 1000. 2. *Esto* special adjudications be redeemable within five, the fifth part is due as in lieu of penalty and sheriff-fee: as apprisings, redeemed within the legal, carry penalties and sheriff-fees, otherwise the adjudger would get no allowance of the expense of his adjudication, or of penalties: for the Act of Parliament, in the clause of redemption, orders only the payment, or consignment of the principal sum and annual-rent the time of the adjudication, the composition to the superior, and charges of infestment. The Lords repelled these two allegiances, in respect of the answers; and found the fifth part also due.

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*Nota.* By the Act of Parliament, creditors, at redemption of partial adjudications, get nothing for expenses in lieu of the fifth part.

*Page 2, No. 6.*

1683. *January 6.* THE EARL of DUNFERMLING *against* The EARL of CALLENDAR.

In the minute of contract of marriage, betwixt the Earl of Callendar and the Lady Dunfermling, *in anno* 1633, he having obliged himself to provide the conquest, debts being first paid, to her in conjunct-fee and liferent; it being alleged, That the said provision did extend only to lands and sums to be conquest, and not to teinds,—for that clauses of conquest are *strictissimi juris*, and land and teinds are *jura separata*;—Answered, The minute being drawn by my Lord himself, who was no lawyer, it appears, that, under the designation of lands, he understood teinds; for, having provided her to the conjunct-fee of the lands and barony of Livingston, without mention of teinds in the obligation, in the clause mentioning the rights and securities granted to her, it bears of the said lands, together with the teinds; which implies, that he looked upon lands to comprehend teinds in the first part of the obligation. 2. The conquest is provided to her in the same way as she is provided to the lands of Livingston, and consequently to the teinds of the conquest. 3. The Lady's opulent jointure of 20,000 merks being the only subject out of which there was any prospect of conquest, it were unreasonable to disappoint her thereof. 4. She being provided to sums, she had right thereto, whatever way employed, whether on lands, teinds, or bonds *jure surrogati*. The Lords, in respect of the conception of the minute above mentioned, found the Lady to have right to teinds. Here, it was not considered, if the teinds were under tack, or annexed to the lands. The Lords also found, That the price of lands sold by the Earl of Callendar, before the marriage, was not to be presumed remaining at the