

1683. *January 16.*—The case between Sir Alexander Forbes of Tolquhon, Dalgard, and Johnston, (*vide* 14th July 1681,) being heard in presence; the Lords found the letters orderly proceeded against Tolquhon, in respect of the two decreets *in foro*, and his bond of corroboration following thereon; though he was in prison when he granted that bond, and though the charger's husband had not fulfilled his part of the minute of contract; but, in regard he found his own inability to do it, he had discharged it. But she was not a consenter, and it did not appear she had any other provision, otherwise it would have been *donatio inter virum et uxorem*, and *tacite* revoked by his discharge.

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1683. *January 17.* MARY and ——— MAXWELLS, Daughters to Drumcoltran, *against* IRVINE and CARLYLES.

THE Lords, on Saline's report, modified twelve bolls of victual to the pursuers, for the year 1682, as an aliment which their father was in possession of during his lifetime, as the excrescent duties of the lands more than paid Irvine the annual-rent of his wadset money. But the Lords declared, if the said two pursuers did not bring their count and reckoning to a close within a twelvemonth, they would not continue the said aliment to them any longer.

Then it was controverted, whether the boll should be Linlithgow measure, which is the common standard for the whole kingdom; or Galloway, where the wadset lands lie, and is much larger than the Linlithgow.—It will clear it much, which of the two was paid to their father.

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1683. *January 19.* WILLIAM CLERK and EDWARD WRIGHT *against* The EARL OF ANNANDALE.

MR William Clerk, and Mr Edward Wright, advocates, as having right to Ruthven of Gairden's wadset on the Earl of Home's estate, pursue this Earl of Annandale, as representing his good-sire, cautioner in that wadset.

The Lords, upon Nairn's report, find Tillibairden and John Elies's comprisings, now purchased in by Annandale, null, as led for some annualrents, now instructed to have been paid before the leading it. But, in regard of the pursuer's consent, they sustained and allowed the same *quoad* principal, annualrents, and true debursed expenses.

A bill having been given in by Annandale against this; the Lords having considered it with Mr Clerk's answers and condescendance, they, on the 27th of January 1683, adhered to their former interlocutor, except as to the first article; they sustain the Earl of Tillibairden's apprising, not only as to the principal sums in the bonds, and their annualrents, but also as to the necessary debursed expenses; but they refused to allow compensation against Elies's comprising for the £480 received by Alexander Lessley, his cedent, to be given to auditor Thomson or Troutback, and the other receipts granted by Alexander Lesley; except Clerk, the pursuer, will offer to instruct that these tickets and

receipts were extant and seen, (they wanting writer's name and witnesses, and appearing to be holograph,) before the intimation of Alexander Lesley's assignation, made to John Elies the appriser. Which the pursuer offering to prove, they allow the same term to the defender to prove that the £480 were accordingly delivered to Thomson or Troutback, and Jerdane's bond retired in the terms of the receipt; as likewise, to prove that the 500 merks to Pennicook, and Jerdane's bond retired from him in the terms of the ticket: and remit to my Lord Pitmedden, (in respect of Nairn, the former auditor's infirmity,) to see the calcul of the balance adjusted; as also, to hear the parties upon any thing farther they have to say, not already debated and determined by former minutes.

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1683. *January 20.* MAXWELL of NETHERYETT *against* STEWART of SHAMBELLY.

MAXWELL of Netheryett's probation against Stewart of Shambelly being advised; the Lords found Shambelly had contravened the 138th Act, Parl. 1584, in beating and invading Netheryett, during the dependance of the plea betwixt them, and so had lost the cause.

Notwithstanding it was ALLEGED for Shambelly,—That the Act of Parliament meant only invasion to the effusion of blood; which was not here, but only a dry cuff. *2do*, That it was only such hurting as might be the ground of a criminal process; which this was not. *3tio*, Though it were, yet self-defence should excuse, he being provoked; and Netheryett being the aggressor, with a false caption, which he did of purpose to provoke, knowing Shambelly's passion; and so, *ex suo dolo non debet lucrari*. *4to*, That there were several compensations already sustained, and other points decided in the cause, as to which Shambelly could not lose these but only the points standing yet undetermined.

All which the Lords repelled; and decerned against him in the whole cause, because they found the Acts of Parliament very strict. *Vol. I. Page 212.*

1682 and 1683. ANDREW CASSIE, Slater, *against* JOHN WILKIE and JAMES BROADFOOT.

1682. *February 11.*—THE Lords assoilyied Wilkie from Cassie's action of damage, (qualified thus, that, by Wilkie's building up his new land in the fore street of Edinburgh, his shops near adjacent were incommoded;) seeing he behoved to lay his rubbish and materials on the street, when he was rebuilding; and the neighbours' prejudice thereby was both casual and necessary, and no ways *in æmulationem vicini; et qui jure suo utitur alteri injuriam facere non videtur*.

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1683. *January 20.*—The Lords,—having considered the report of the masons upon oath, to whom the consideration and visitation of the chimney was