

The Lords having heard the bill and answers, they sustain Tolquhon the defender's allegiance in these terms, that the defender offers to prove, the way controverted is the high-way directly leading from a burgh-royal, *viz.* Banff, to a burgh-royal, *viz.* to Aberdeen, or from Banff to a sea-port directly, and so is the king's high-way: and adhere to the Act as to the other points, allowing to prove that he had prescribed a way for peats, by forty years' possession before interruption; and refused to grant a commission or visitation; but prorogate the diet of reporting the diligence to the 25th March next.

For high-ways consider the 53d Act Parl. 1555; 156th Act 1592; 38th Act 1661, article, *Of the High Ways*; and 16th Act 1669; Mascard. *de Probat. voce, Via*; Bart. Cæpolla, *de Servitut. tractat.*<sup>2</sup>, *cap.* 3; and Stair's Institut. tit. 17, *Of Servitudes*.

It was ALLEGED for the Chancellor,—In thir cases there was only *tantum præscriptum quantum possessum*, and no more; so that his use and custom of carrying lime that way ought not to give him right to carry peats, (unless he had carried also peats that road forty years,) these being *diversa*; and it being odious to burden another man's lands with servitudes of high-ways; yet the carrying the one is no more prejudicial than the other. See Craig, *feud. lib.* 1. *dieges. ult. de Regalibus*. And, by this interlocutor, no way ought to be reputed a king's high-way, unless both the *terminus a quo et ad quem* be public; whereas lawyers think it enough though it begin *in agro privato, si exitum habet ad viam publicam, vel urbem, vel portum, vel flumen navigabile*, or to a kirk, or to a moss. The Chancellor would make Tolquhon to have right only to a foot-way, or an *actus* at most, for a horseman, but not to be a *via* for carts or wains, or droves of cattle. *Vide* 26th March 1684. *Vol. I. Page 274.*

March 26.—The Chancellor's action against Sir Alexander Forbes, mentioned 27th February 1684, is called; and though Tolquhon had a diligence running, and the circumduction for not producing it was only conditional till the 22d of March, before which he produced it, and craved a second diligence; yet the Lords rejected it, and advised the probation led by the Chancellor; and declared his lands free (*nam unumquodque prædium præsumitur liberum nisi servitus probatur,*) of any high-ways for leading of peats; and found Tolquhon had not proven his right of servitude; and therefore assoilyied my Lord Chancellor and his lands. *Vol. I. Page 285.*

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1684. March 27. The EARL of WINTON against PATRICK CUNNINGHAM.

THE Earl of Winton gave in a bill, craving Mr Patrick Cunningham, agent, might be examined on the declarator of trust of a tack of prorogation of George Young's teinds in Winchburgh, in respect he was on death-bed.

The Lords recommended to my Lord Edmonston to go to his house, and take this oath; but he died before his examination.

Winton, by another bill, craved one Robert Seton, in Tranent, to be examined upon the tenor of a lost bond, whereon there was an action depending, to the effect it might lie *in retentis, ad futuram rei memoriam*.

The Lords likewise granted the desire of this petition ; and appointed — to take his oath of knowledge in relation to that bond, in the vacance.

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1684. *March 29.* THOMAS ROBERTSON *against* WILLIAM LAMB and WILLIAM GILCHRIST.

THE case of Thomas Robertson, with William Lamb and William Gilchrist, merchants in Edinburgh, was advised summarily ; (both parties having consented to the summary discussing thereof ; ) and the Lords found, by the depositions of the customers, waiters, and porters, that the 2000 deals in controversy were not confiscated by any fault of Thomas Robertson, but through the Norway skipper's short report of 7000 deals only, and concealing this 2000 ; (this differs from a short entry ; ) and therefore found Thomas liable only in the price of the 7000 deals : though he bought the whole cargo, yet the confiscation not arising from any fault in him, it could not be upon his peril : and therefore assoilyied him from the rest.

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1684. GRAHAM of CLAVERHOUSE *against* The EARL of LAUDERDALE.

*January 24.*—COLONEL Graham of Claverhouse insisting against the Earl of Lauderdale, upon the king's letter, to dispone to him the house, yards, and parks of Dudhope, with the constabulary of Dundee, he paying 20 years' purchase for it to the Chancellor,—to which 20 years' purchase, Lauderdale, on his transaction with the Chancellor, was assigned :—It was ALLEGED,—*Esto* this were the king's cause, yet, not being called within 48 hours after the returning of the process, he behoved to have 15 days' advertisement, conform to the 16th Act of Parliament 1672, ratifying the regulations : which he had not got.

The Lords repelled this, in regard the king's letter mentioned *supra*, 13th December 1683, recommending to them to agree, was a *medium impedimentum* ; and there was but 48 hours between the upgiving of the tryste and the calling, which satisfies the Act of Parliament.

Then ALLEGED,—The sum of £4000 sterling of the Mint-decreet being gifted to Claverhouse, the king was denuded, and it came to be in the case of a common donatar ; who had not the privilege of a summary calling, but behoved to abide the course of the roll.

The Lords find the letter made it still as if it were in the case of one of the king's own causes.

After repelling thir dilators, then Claverhouse insisted that Lord Lauderdale might either purge all the incumbrances that affected the house and yards, or else give him real warrandice out of his other estate.

The Lords delayed to answer to this, seeing the offer of absolute warrandice may satisfy ; for, by an inhibition served upon it, it may be made more effectual than real warrandice, which is restricted to a particular subject, out of which it