

1688. *February.* ISOBEL THOMSON *against* MARTHA GRIEVE.

FOUND that a person having a bounding infestment, which is *ager limitaneus*, could not claim lands without the bounding as part and pertinent.

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1688. *February 1.* LORD TARBAT *against* The CREDITORS of CROMARTIE.

THE Lord Tarbat, a considerable creditor upon the estate of Cromartie, having raised a sale thereof upon the Act of Parliament, and bought the same at the roup, he craved an extract of his decret of sale. Alleged by some creditors, That all the common debtor's lands were not roup'd, and the remainder, being only fractions, would not go off at so good a rate as if they had passed with the whole. 2. Some having rights transcendant over all the estate, and others having particular localities, it was recommended to the Lords to determine how the price should be distributed; and it was offer'd, as a just and equal method, that, after payment of the transcendant right as preferable, the remainder of the price should divide *pro rata* of the debt due out of the distinct localities, where there cannot be prior or posterior among rights upon different lands. Alleged by other creditors, That the best rule would be this:—if there were no transcendant right at all; or, if the rest of the estate, beside the special localities, were sufficient to satisfy the transcendant right, without encroaching upon any of the localities, then the creditors of the special localities should be satisfied, *pro rata* of their debt; but, if the transcendant right did encroach upon the localities, then the creditors in the localities should be preferred to the price, according to the priority of their right. The Lords found the defence, that all the debtor's lands were not roup'd, not competent now after the roup and the lands sold; but ought to have been propon'd when the rental was to be proven, especially seeing the Act of Parliament allows the sale of the whole lands, or a part of them: They found also, that, where there is no transcendant right, or such a one as does not encroach, &c. the debt upon the special localities is to be paid *pro rata debiti*, unless one of the special localities be not a full security for the debt upon it; in which case it is only to be considered *quoad valorem*. But they found, that, where there is a transcendant right encroaching upon the special localities, these localities are to be preferred according to the antiquity of their respective infestments; 1st *February* 1688:—Although by this means the creditor, by the last right, might chance to be wholly cut off from payment, and yet behov'd to lose his security by the locality to which the other had no right; which seems hard, since the Act of Parliament appoints a legal vendition, without consideration of the preference of right. And, as the creditor, having the transcendant right, might have affected the posterior locality, and suffer'd the other locality to be free, so law may justly do it. Some of the Lords were of opinion, that the creditor, having the transcendant right, should communicate it *quoad* the lands not sold to the creditors having special localities, that they might have a title to these lands, to make up the prejudice done to them by the transcendant right, and might be preferred to

creditors having posterior rights, or to personal creditors, who, upon a diligence, would come in within year and day. In this process, it was also found, that creditors having real rights, though they got but payment, should assign with warrandice from fact and deed, and that it was not enough for them to renounce; and that the expense of the roup and process should come off the creditors who got payment, *pro rata* of the payment.

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1688. *February 2.* PATRICK TELFER *against* SMITH.

THE Lords granted a warrant to the creditors of one Smith, a London factor, then at Edinburgh, to secure him there, till he should find caution both *judicio sisti* to all the diets of process, and *judicatum solvi*, upon a representation by the creditors that he was returning to London; which seems hard; but, the party having represented that the warrant was calumniously impetrated,—the Lords stopped it.

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1688. *February 2.* LADY BOOGHALL *against* The DUCHESS of LAUDERDALE.

A LEGACY, left by the Lady Lauderdale to the Lady Booghall, in a testament wrote by the legatar, not sustained unless otherwise adminiculated; and Lord Shomberg, one of the witnesses, only, was alive, Mr Cloud being dead.

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1688. *February 18.* The LAIRD of DECKMONT *against* COLONEL BORTHWICK.

IN a pursuit, at the instance of one deriving right from the deceased Hamilton of Deckmont, against Colonel Borthwick, for payment of some bonds due by the Colonel, and assigned to Deckmont, his father-in-law; the defender produced Deckmont's missive letter, bearing, that the defender had left 5000 merks with him for paying these bonds. Alleged for the pursuer, That the subscription of the missive was very suspicious; and the missive was also null for not being holograph, and wanting witnesses. The Lords, upon comparing Deckmont's subscription of the letter with his other true subscriptions, found it very different in the shape of the letters; and found the missive not probative for want of witnesses.

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1688. *February 18.* DECKMONT *against* COLONEL BORTHWICK.

THE Lords sustained a defence of nullity against a missive not holograph, re-