

ascribe his possession to the annualrents of Crawford's sum, for years subsequent to the 1681, which was the last year of his possession, though the compensation was not proponed nor applied by Linthill till 1687. And the Lords did not regard whether Linthill intimated his right before, or whether Sir James knew of it, seeing she had a decreet of poinding of the ground on her infeftment.

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1694. *January 10.*—Sir James Cockburn of that ilk, against Home of Linthill, mentioned *supra*, 18th January 1693. The Lords thought the intimation made of the assignation to Sir James was not sufficient to put Douglas of Lumsden, the debtor and heritor, *in mala fide* to pay these years assigned to Elizabeth Lyell, the lady, and Linthill's cedent: but laid hold on that allegiance, that the lady's discharge produced did not proceed upon payment of money for these years assigned; but the assignation was held and reputed as payment, and so allowed in the count betwixt them. But they would not admit this to be proven by the writer and witnesses in the discharge, but only by Lumsden's oath, (to whom the discharge is granted;) but permitted them to confront him with the lady and the witnesses, to refresh his memory, at the time of his deponing, if they thought fit to cite them for that effect.

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1694. *January 11.* SIR WILLIAM KER *against* DAVID HEPBURN OF HUMBIE.

CROCERIG reported the case of Sir William Ker, Director of the Chancery, against David Hepburn of Humbie, on a decreet, holding him as confessed upon a promise of payment. The generality of the Lords thought the grounds urged by Humbie for purging his contumacy, and being reponed to his oath, very plausible, *viz.*—That, at the first term assigned, he was indisposed, and keeping the house, though he was recovered before the circumduction; that the act was put up in the minute-book, not in Sir William's name, but in Mr John Slack's name, and that, before the decreet, Mr John Slack was dead, who was the principal pursuer; albeit there was also a conclusion in the summons at Sir William's instance, that he ought to be relieved of that cautionary: yet they thought fit to delay the taking in the report, till it was tried if the parties would settle in the terms of the transaction Sir William had made with Slack, whereby he had componed the debt for near the half; seeing he was the principal debtor's brother and apparent heir, and only pled that his niece, the Lady Livingston, as heir of line, was not first discussed, and that his brother was interdicted; which did not seem so favourable a case.

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1694. *January 12.* GEORGE HOME OF KYMERGHAM *against* The EARL of HOME.

THE Lords advised George Home of Kymergham's cause against the Earl of Home, wherein the Lords adhered to their former interlocutor, 16th of February 1692, finding that the posterior articles were an innovation of the first contract; and though the Earl was at first personally bound for payment of the annuity

of £100 sterling, yet that he was, by the subsequent agreement, only bound to grant a real right out of the lands of Ayton; though *novatio non præsumitur*. But, in regard he had not as yet given that infestment, they found the Earl personally liable for the bygones, since the date of the contract in 1683, and in time coming, until he offer the said real security; and that, in regard he has, by his oath, acknowledged that he has possessed these lands, worth 5000 merks *per annum*, and that the rights condescended on neither excluded himself from the possession, nor could have debarred Kymmergham, if he had been infest, seeing they are not real burdens affecting the lands of Ayton; and though there was a provision in the tailyie, burdening the heir with all the debts, yet that did not make it real. And as for Muirie's bond, it was only conditionally conceived, and made payable in a year after Ayton, the granter's death, if so be he had wanted heirs of his own body: but *ita est* his daughter succeeded, was served heir, and possessed; and so the bond was extinct; not being like a tailyie, where the clause *quibus deficientibus has tractum temporis successivum*, so that, *quandocunque* the heir fails, the next member of the tailyied succession takes place. Some moved, that the interlocutor, making the Earl liable for bygones, should only begin from the time that Kymmergham performed his part of the articles, by delivering up the papers to my Lord; but they found there was neither *mora* nor *culpa* on Kymmergham's part, and, *esto* my Lord had been lesed through the want of them, yet *sibi imputet* since he had not required them. *Vol. I. Page 591.*

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1694. *January 12.* SIR DONALD BAYN of TULLOCH *against* ROSS of BALNAGOWAN.

SIR Donald Bayn of Tulloch pursuing a spuilie against Ross of Balnagowan, and several of his tenants, he, by a petition, craved the Lords would grant him an edictal citation against the depredators: seeing he was content to cite Balnagowan himself personally; but for his men, they skulked in the Highlands, *ubi non erat tutus accessus*, and that no messenger would undertake to execute it against them.

The Lords considering if this were once granted, every one would pretend the same necessity; and so there would be no more citations to parties, either personally or at their dwelling-houses, in the Highlands; and that citations at the next market-cross could not certiorate them; they refused the desire of the bill, unless it had been in time of war or outbreaking among them. And yet there are some parts where, in the most peaceable times, messengers dare not adventure amongst them. *Vol. I. Page 591.*

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1694. *January 16.* THE SISTERS of SCOT of BROADMEADOWS, Petitioners.

THE sisters and apparent heirs of Scot of Broadmeadows gave in a petition, craving a factor might be named, to intromit with the father's and brother's moveables, and sell them; and to set the land and lift the rents, until they get fuller information of his death in Jamaica. Some were against it, seeing they