the whole debate in the decreet before the interlocutor, that it behoved to be the Lords' sense and meaning that Rankeiler's tack was extinct and passed from by Dumfermline's accepting a posterior tack from Queen Anne; seeing *posteriora derogant prioribus*, and that the law notion of incompatibility is, that they cannot both subsist, but the last is interpreted to be a renouncing, quitting, and passing from the first: though, if one look here to the *cortex verborum* of the interlocutor, it favours the Chancellor, as if Queen Anne's tack had been found null, as inconsistent with Rankeiler's tack: which the Lords could not judge on, seeing Rankeiler's heirs were not called. This alteration fell by some of the Lords changing their votes, and by two declaring themselves *non liquet*; so, as before it was seven against five, it was now six and six; and the President's vote in favours of Lauderdale did cast the balance. Sentences of judges deserve the same allowance that other acts have by law, *viz.* that such an interpretation is to be laid hold on as will make it consistent with itself, and evite absurdity, and cause it subsist and not fall as null. *Vol. I. Page* 626.

1694. *July* 5. JAMES NAYSMITH *against* The TENANTS of WHITSLAID and WILLIAM MONTGOMERY.

JAMES Naysmith, pursuing the Tenants of Whitslaid, and William Montgomery, on a general service, as heir to his mother;—it was OBJECTED,—That it was not a sufficient active title to carry the right of the adjudication, because there was infeftment passed thereupon. ANSWERED,—He passed from the infeftment; and, in that case, there was no doubt but the general service was sufficient. The Lords found he could not divide them, seeing there was infeftment actually taken; and which could not be conveyed but by a special service. *Vol. I. Page* 626.

1694. *July* 5. THOMAS YOUNG and JOHN THOMSON *against* DONALDSON, GAIRNS, and GUTHRY.

THERE was no doubt but the certification in a single reduction was taken off by production of the writ then called for, on paying the expenses; but the difficulty was, By your not producing it then, you defrauded me of this reply, *viz.* that you was satisfied and paid by your intromission; and which I would have proven by Helen Thomas her oath; and which I now lose by her death. The Lords reponed them, finding the mean of probation was not perished; seeing they might still prove her intromissions either *scripto*, by her discharges, or even by witnesses, that she possessed and intromitted. *Vol. I. Page* 627.

1694. *July* 5. MR JAMES DEAS, Advocate, *against* JAMES HAY, Writer to the Signet.

THE Lords found, As to the 500 merks of fine that he paid, there could be no

process for restitution of it sustained here; seeing, by the rescissory Act of Parliament 1690, that case is expressly referred to the Commission. But, as to his conclusion that the 2000 merks bond should be redelivered to him, if he insisted on that ground of the common law that it was for the discharge of his fine, which he never got, and so was *causa data et non secuta;* that he could have the privilege of summary discussing, that being indulged to those within the compass of the act: but, if he insisted on the claim of right and Act of Parliament 1690, it behoved first to be instructed that he was in one of the cases there mentioned; though he argued, the case being as favourable, was the same. And here the decreet, not being recorded in the Privy Council books, (which should make the clerks liable on their omission,) the question occurred how it shall be proven what was the cause of his fining. Some proposed to take his own oath upon it; but the Lords ordained James Hay, upon oath, to produce the bond; and if it did not bear its cause, also to depone anent his knowledge of the cause of it, and for what the fine was imposed. *Vol. I. Page* 627.

1694. *July* 5. JOHN KINNAIRD *against* PATRICK M'DOUGAL.

THIS was a charge on a bond for £8 sterling. The reason of suspension was, —I offer to prove, by your oath, though the bond bore borrowed money, yet the true cause of granting thereof was for the price of a horse; and that being confessed, then I offer to prove, by the witnesses present at the bargain, that I having questioned the horse as having the cold, you in express terms promised to uphold it. ANSWERED,—That cannot be proven by witnesses, being a promise *et nuda verborum emissio;* and the debt being constituted by writ, the debtor's oath must be taken on the whole; and the manner of probation cannot be divided.

The Lords, *first,* found the allegeance not relevant, of his undertaking to uphold it, unless the suspender also joined this with it, that, how soon he discovered the distemper, he offered him back again, as the *edictum ædilitium* requires. *2do.* Found, if he, upon oath, acknowledged that the cause of the bond was for the horse's price, then it reduced it to this point, as if there had been no bond at all, or as if the bond had borne that express cause in its narrative; in which or either of these cases the terms and conditions of the bargain might be proven by witnesses; and therefore allowed it to be so proven here.

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1694. *July* 5. JOHN HAMILTON in HALSIDE *against* GEORGE GORDON of EDINGLASSIE.

THIS was a summons on the passive titles, as lawfully charged to enter heir to his father and goodsire. The DEFENCES were,—No process, because he was designed *John,* whereas his name was *George;* and having now discovered their mistake, they mended it; but it was clearly vitiated. The Lords thought this was only *error in nomine,* seeing *constabat de persona;* and *esto* his first