

1694. *July 26.* The EARL of ANNANDALE *against* The TENANTS of DALTON.

THE Earl of Annandale against the tenants of Dalton, for payment of a mart laidner-cow, out of each parish, to the number of thirty-two parishes; as a *reddendo* in his charter, for keeping the castle of Lochmaben. The tenants ALLEGED they were not liable in any such servitude, but only their masters, who were not called; and they denied the custom.

ANSWERED,—It is like a *debitum fundi*; and he offered to prove possession, by witnesses at the bar.

The Lords found thir duties no otherwise acclimable than they had been possessed; and allowed the Earl to prove the notoriety of the custom by witnesses: notwithstanding they offered to prove interruption, seeing he did not singly found on prescription, but likewise instructed a right by his charter. Many of thir constabulary dues are claimed where the service ceases; as Nithsdale's castle of Threat; the constabulary of Dundee: and here Lochmaben castle is demolished, and so can have no garrison to protect them from thieves. Thir extortions have been always complained of. *Vol. I. Page 638.*

1694. *July 26.* MR JAMES M'CULLOCH of PILTON *against* MR JAMES CAITHNESS, his Writer.

THE Lords found Pilton's assigning him to the adjudication, with warrandice from his own fact and deed, it was no contravention of the warrandice that there was a nullity in the adjudication,—*viz.* That it was executed before the forty days of the general charge were run out; because he had led the adjudication himself. *Vol. I. Page 638.*

1694. *July 26.* The EARL of SOUTHESK *against* OGILVIE of BELLETTY, &c.

THE Earl of Southesk against Ogilvie of Belletty, and some others of his vassals; who alleged they could not take terms to produce any writs granted to them or their authors, by the Earl's predecessors and authors, to whom he may succeed *jure sanguinis*, unless he be actually served heir to them, or otherwise derives right from them.

The Lords demurred on this point, and found the late decisions run so. But Stair, *Book IV. tit. 20*, complains that this straitens the extent and usefulness of certifications too much. It was ordained to be heard in presence.

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1694. *July 26.* DOUGLAS, Skipper, *against* The LAIRD of SWINTON.

DOUGLAS, skipper, against the Laird of Swinton; who ALLEGED, That there

was no freight due from Leith to Eyemouth, for what deals, &c. he carried for him ; seeing he was, by the charter-party, to come there however, and take in a loading of corn, that portage being only as ballast. *2do.* That being blown away by storms to Norway, he could not claim the freight, average, nor demurrage.

ANSWERED to the *first*,—*Invecta et illata in navem* are hypothecated in law *pro nauulo*, even without a paction. And to the *second*,—The *vis tempestatis* being *casus improvisus*, without the skipper's fault, he ought not to suffer.

The Lords decerned ; but recommended to the Ordinary to settle them.

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1694. *July 26.* ROBERT NASMYTH, Bailie of Hamilton, *against* JAMES HAMILTON of AIKENHEAD.

THE Lords found a bond, thus conceived, To a husband and his wife, and to the longest liver of them two, and their heirs, executors, and assignees, did not make the wife fiar of the sum, because she was the longest liver, as was contended, but only liferenter ; for, in all these cases, *potior est conditio masculi*. But it would have been otherwise if it had been to the heirs of the longest liver ; for that termination of heirs would have determined the fee to her, if she had outlived the husband.

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1694. *July 26.* ELIZABETH PETER *against* PORTERFIELD of FULWOOD.

IT being alleged for Elizabeth Peter, relict of William Montgomery of Mackbyhill, *against* Porterfield of Fulwood, That her consent to his wadset was in her minority, and she had revoked it now ; and, though it was not done *intra annos utiles*, yet it was sufficient, she being then *non valens agere*, because clothed with a husband.

The Lords found, a wife's *quadriennium utile* ran, whether she was married or not in that time ; and that she, not revoking, could not reduce.

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1694. *July 27.* LORD POLWART *against* SIR JAMES DICK.

MY Lord Polwart *against* Sir James Dick, who refused to take a second term in Polwart's reduction and improbation, because he offered immediately to debate the nullity of Polwart's right, being entered by the king ; whereas Home of North-Berwick was Heugh's superior, these lands not being annexed to the Crown, but expressly reserved out of the act of annexation, (being act 29th, 1587,) where it is disputable whether the superiority, or only the property, be excepted, as Polwart alleged.

The Lords, thinking this debate foreign *hoc loco*, they repelled it *against* the