

1694. *February 5.* MR DUNCAN ROBERTSON *against* MR PATRICK SMITH.

THE Lords advised part of the debate between Mr Duncan Robertson and Mr Patrick Smith, about the assignation which Mr Duncan gave of the inventory of the executry; whether it was a consigned evident, or delivered in obedience to the decreet, though the receipt did not bear borrowing, but delivery.

The Lords having examined the clerks, with the extractor and Ordinary, they found there was no warrant for giving it up as a delivered evident, but only to lie in the process till the suspension were discussed; and, therefore, found that Mr Patrick Smith had unwarrantably taken it up, so as to make use of and registrate it. But the Lords thought, third parties who had transacted with Mr Patrick on the faith of that assignation, (as my Lord Stair had done,) were secure; this not being a *vitium reale*, but only striking against Mr Patrick himself. However, that point fell not in upon this process. *Vol. I. Page 647.*

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1694. *Nov. 23 and Dec. 6.* DAVID HEPBURN OF HUMBLY *against* The VISCOUNT OF KINGSTON.

*November 23.*—HE, pursuing for mails and duties on two adjudications disposed to him by his sister the Lady Whittingham, they raise a reduction on thir grounds:—*1mo.* The adjudication is null; because it is from \_\_\_\_\_ term of her annuity, to \_\_\_\_\_ term; and all then due did not extend to the sum adjudged for. *2do.* The advocates craved it only for the 2000 merks of annuity; and yet they also adjudge for the penalty. The Lords repelled thir two, as of no moment; for it was not instructed by discharges that the preceding terms were paid: and the Lords thought, where procurators crave a decreet for an annuity, that the failyie followed as an accessory consequence, unless he had restricted the libel.

The *third* reason was also repelled, *viz.* That the party called in the decreet of pointing of the ground being dead, and the terms there resting being now paid, there behoved to be a new decreet obtained for constitution of the debt. For the Lords found, That, though both master and tenants were changed, and though the lands should go through twenty hands, yet the first decreet of pointing of the ground subsisted against all successors.

But they demurred on the *fourth* nullity, *viz.* That the Viscount of Kingston, not being the granter of the liferent-infetment, but only apparent heir to him, he should have been charged to enter heir before any adjudication could proceed against him; which the Lords had found was necessary in comprisings, *25th February 1627, Earl of Cassillis*; and *29th January 1635, Moncrief*. The Lords were divided on this: some thinking it a nullity to restrict the adjudication to the principal annuity, and to cut off the accumulation of its bearing annualrent; which was all the extent for which the objection was urged: and others, thinking there was no need for a previous charge, because the apparent heir, being cited *pro interesse*, the ground was the direct party-contradictor, and the