

Callicini to have carried to Rotterdam. *Qdo.* Of L.300 for not producing the said skipper, conform to his promise, whereon he was holden as confessed. It was alleged the court was held in a tavern, and that judges could not hinder parties to agree, and take up their papers when they had done. The Lords turned the decreet into a libel, and reponed John Spreull again to his oath.

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1695. *February 1.* ISOBEL LUKE *against* WILLIAM DUNDASS.

ARNISTON reported Isobel Luke, relict of Bailie Thomas Wylie, against Mr William Dundass, advocate, about a ruinous upper tenement belonging to the said Mr William, which he neglecting, the rain spoiled the inferior storeys belonging to the said Thomas Wylie. Mr William had, ten years ago, obtained an act of the Dean of Guild of Edinburgh, finding, after a visitation, That the said roof being faulty, he was in the terms of the act of Town-council, ratified in Privy-council 1674, appointing all the heritors to concur and rebuild with stone and lime. Thomas Wylie's relict and children thinking themselves prejudged by this act, they procured a new one, ordaining the said William to repair his roof, as incumbent on him from the natural servitude due by the superior tenement to the inferior. Mr William complained of this last act, alleging the town could not alter their first sentence, and that the tradesmen visitors had varied; first declaring the roof irreparable, and then that it might be helped.

The Lords found the second act wrong, and that they could not ordain him to repair a ruinous roof, being all one as if it had been burnt; and therefore thought they behoved to demolish and rebuild it in stone. But afterwards they altered this in Mrs Wylie's favours.

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1693 and 1695. SIR JOHN INGLIS of CRAMOND, *against* ARCHIBALD PRIMROSE of DALMENY.

1693. *February 17.*—ARCHIBALD Primrose of Dalmeny, and Sir John Inglis of Cramond, having mutual declarators of their rights of fishing in the water of Cramond; the Lords allowed each of them a joint probation, how they had possessed, and if they had debarred or interrupted one another; and laid small weight on Cramond's letter, as being only *epistola officiosa*, writ in a compliment by a young man, who knew not then his own right; and that letters were not *habilis modus*, either to give or take away real rights.

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1695. *February 1.*—The Lords advised the mutual declarators of the right and privilege of fishing on the water of Cramond, pursued by Alexander Primrose of Dalmeny, and Sir John Inglis of Cramond. The Lords thought Dalmeny's rights were both more ancient and special than Cramond's, and that his possession was more pregnantly proven. But, in regard the river was the march

between the shires of Linlithgow and Midlothian, and that both their infeftments bore only the fishings lying in their respective shires; therefore, the Lords found each of them had a right of fishing on their own side of the water, to the middle stream; and that they were compatible, and taxed by the restrictive boundings of the two shires; and that Dalmeny had not the sole right of fishing, exclusive of Cramond, as he contended, nor had he prescribed it by forty years' possession; but that there had been a promiscuous fishing, though Dalmeny's author's acts of possession were stronger, some of his witnesses deponing they knew Barnbogle debar all others, and had the fishing set for fifty or sixty merks yearly; and that, though others fished there, it was precarious, and by tolerance. But the Lords thought it more equal to divide it, in manner foresaid.

Cramond had produced an older right, when the cause was first reported, and the act granted; but it was lost and fallen by,—*viz.* a charter of erection from James II. to Alexander Lauder, then Bishop of Dunkeld, in 1454, erecting the lands of Cramond, Aberlady, &c. into a barony, and gifting them to the see of Dunkeld; and which was proven by Spotiswood's History, page 100. But histories are not authentic and probative against men's rights; though, *in re antiqua, et in ambiguis*, they may be adduced as adminicles, even as we use marchstones and sepulchral inscriptions. On the 28th current, Dalmeny presented an appeal against this interlocutor, because the Lords had found his right of fishing was not exclusive of Sir John's.

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1695. *February 5.* CAPTAIN YOUNG *against* COLONEL WAUCHOP'S nearest of Kin.

HALCRAIG reported Captain Young against the nearest of kin of Colonel Wauchop. This was a competition for the sum of 6000 merks, between the Captain, as executor to his wife, who was the Colonel's sister and assignee, and the Colonel's other sisters. The first point was, Whether he, as being executor decerned, and having found caution, ought to have up the money; or, if they might not crave more sufficient caution. Several thought he was *in titulo*, having the office decerned to him; and they could not hinder. Others considered how slightly the commissaries bestowed it upon any who sought it, and were not exact in their caution, for which the clerks were answerable.

The Lords proceeded, therefore, to determine the case, and thought this assignation given by the Colonel, reserving a power to alter, needed no delivery; and that Captain Young's letter to my Lord Edmonston implied a trust left him by the Colonel, in keeping the assignation, but no depositions, these two being very different; and that he could not prejudice his child's right; and, therefore, Edmonston's oath could not be taken as to the terms and conditions of the depositions; and found, the Colonel's letter did not import a revocation or alteration of the assignation; and so preferred the Captain.

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