

fiars to repair liferented tenements, on their finding caution to secure the liferenter who had suffered the tenement to go to ruin or decay. And the Lords have found, where a fiar of a house within burgh inclined to dwell in it himself, the liferentrix must cede the possession, on his finding sufficient caution to pay her the rent it then gave.

REPLIED,—That only held where the debtor, in the liferented sum, was *vergens ad inopiam* ; for then it was the benefit and concern of both fiar and liferenter, that the sum should be preserved ; but here the debtor Blackness's solvency was not questioned.

The Lords, by a scrimp plurality, found the lady, as fiar, might uplift the sum, on caution to pay the liferentrix the annualrent thereof termly ; but it behoved to be burgh caution within the town of Dundee, that her present security may not be any way diminished or deteriorated. And their offer to pay her at Dundee was not enough, unless she had a dwelling there to exact it from.

*Vol. II. Page 533.*

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1709. December 8. CUNNINGHAM of CRAIGENDS against The EARL of EGLINGTON.

CUNNINGHAM and the Earl of Eglington. Cunningham of Craigends, being heritor of the village of Kilbarchan in Renfrewshire, obtains a charter from the Queen, in 1704, to himself in liferent and his son in fee, containing a *novodamus*, and the right and privilege of keeping a yearly fair on the 4th of December, and uplifting the customs and duties of the same ; whereupon, being infest, he raises a declarator against the Earl of Eglington, heritable sheriff of Renfrew, pretending right to the same duties, and craves it may be declared that he has the sole and only right of holding the said fair, and uplifting the duties payable for weighing the goods, and furnishing other accommodations to the merchants resorting thither.

Against which declarator it was ALLEGED for my Lord Eglington,—That he stood infest in the heritable sheriffship of Renfrew *cum omnibus feodis, divoriis, et privilegiis eidem pertinentibus* ; and, by virtue thereof, he and his authors were in the immemorial possession of uplifting a small duty for the weights at that fair, long before Craigends' charter giving him right thereto. And he being the sovereign's lieutenant in that place, *et publicus justitiæ vindex*, what could hinder him to take a moderate duty for his pains in overseeing the weights, that the neighbours, in buying and selling, should not overreach one another ; and this possession has been sustained to give a right to the *Lord Halton*, come in place of the *Scrimgeours, Constables of Dundee*, against *the Town of Dundee*, 9th December, 1679 ; and in *the Earl of Kinghorn's case*, against *the Town of Forfar*, 18th July 1676 ; and again, *Farquharson* against *the Earl of Aboyne*, 2d December, 1679. 2do, You can never quarrel my right ; for your father took a tack of thir customs from me, in the 1677, during his life, for payment of ten merks per annum, and so, you having homologated and acknowledged my right, that excludes you, *exceptione personali*, to come against your own deed.

ANSWERED for Craigends,—That were a slavery indeed, if sheriffs should exact customs within my burghs of barony and property ; and it is plain law, that

the *exactio vectigalium*, or lifting of customs, is *inter majora regalia*, and not transmitted by a general jurisdiction, as *Sextinus de Regalibus* shows. And the erecting a sheriffship does not hinder her Majesty from granting fairs within that same bounds; as Sir George Mackenzie gives sundry examples of, in his *Criminals*,—*tit. Regalities*. To the *second*, My father's entering in tack with you, can never militate against me, who never owned your right. Likeas, The Queen's supervenient gift of this fair takes off any preceding homologation.

The Lords found my Lord Eglinton's title, as sheriff, was no sufficient title to prescribe a right of exacting customs within another gentleman's property: and though in this cause it was *lis de paupere Regno*, yet it might be of consequence in other parts of the kingdom.

*Vol. II. Page 538.*

1709. *December 8.* JAMES PATERSON OF WOODSIDE *against* WILLIAM HANNAY.

A COMPLAINT having been given in by Mr James Paterson of Woodside, against William Hannay, agent in Edinburgh, that he had impetrated a bond of 3000 merks from him, under a back-bond, declaring, it was but a trust to lead an adjudication upon it, against him; yet he had assigned this bond to James Hutcheson, writer to the signet, who had charged him with horning, and inhibited him thereon, contrary to common honesty and his trust: And this being remitted by the Lords to their committee for trying abuses, they, after hearing of all parties, found the diligence unwarrantable, and reponed Paterson against it, imprisoned Hannay, and declared him incapable of managing or agenting any process about the Session; but found Mr Hutcheson innocent and free. And, that this sentence might terrify others, they ordained it to be publicly intimated in the Outer-House, and affixed on the walls and doors of the Parliament House, that all may take special notice of such dishonest practices in time coming, to the scandal and reproach of justice, when they escaped unpunished after discovery.

*Vol. II. Page 538.*

1709. *December 13.* SIR ALEXANDER FALCONER OF GLENFARQUHAR, Petitioner.

GLENFARQUHAR and Halkerton. The Lord Halkerton having been furious these eighteen or nineteen years bygone, and having, in his madness, killed a man; and Sir Alexander Falconer of Glenfarquhar, his nearest agnate and next heir, thinking his affairs not well managed, raised a brief out of the Chancery for cognoscing his furiosity, at his own house of Halkerton, by the sheriff and an inquest: My Lady, his mother, disappointed the first briefs, by taking him out of the Sheriff of Kincairden's jurisdiction into the Town of Montrose: Of which Glenfarquhar having complained, there is a new brief raised and executed, of which an advocation is presented, desiring it may be brought before the macers, and he brought over to Edinburgh; and that assessors might be adjoined, who would best judge if he was reconvalesced or not.

The grounds for the advocation were, *1mo*, That the degrees of idiocy and

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