

The Lords found he had interest. Then Skirling offered to redeem from Grange. The Lords found it was more reasonable and just that Grange should be preferred, and therefore allowed him to purge the failyie; and repelled Skirling's offer of paying him.

*Vol. I. Page 389.*

1686. *January 7.* DOCTOR SINCLAIR *against* SIR JAMES COCKBURN and LORD SINCLAIR.

THE case of Doctor Sinclair against Sir James Cockburn and Lord Sinclair was reported by Carse. The first point was: the Doctor having got a bond of provision from his brother Hermiston, this Lord Sinclair's father, for 2500 merks; when he is abroad he draws a precept for 500 merks on Sir James Cockburn, payable to — on his discharge; which presupposes that there were effects in Sir James's hands, whereas there were none but only a part of the Lady Hermiston's annuity, to the arrears whereof the Doctor has since got right. And Sir James contending that this was *indebite solutum*, and no specific discharge of it; the Lords found, seeing the Doctor had granted some posterior discharges, though they were general, yet they satisfied the quality of the precept. Then Sir James offered to prove, by the Doctor's oath, that this was never allowed him; which was found relevant.

The second point was, Sir James remitted 1100 merks to the Doctor in France, upon bills of exchange: when the Doctor comes home, he counts with Lord Sinclair, his nephew, and gets a bond from him (without discounting the sums paid by Sir James,) for 5000 merks, being both his portion and the by-gones of his mother's jointure. When Sir James comes to count with his son-in-law Lord Sinclair, and gives up thir articles paid to the Doctor, my Lord refuses to allow them: whereon Sir James raised an action against the Doctor for repayment; and the Lords assoilyied the Doctor, upon this ground, that it is presumed thir prior payments were all discounted at the time of the posterior new bond. Sir James Cockburn gave in a bill against this, that the presumption cannot hold unless he prove that Lord Sinclair knew of thir partial payments at the time he granted the Doctor this new bond: which seems reasonable; for, if they did not consist with his knowledge, how could he default them.

*Vol. I. Page 389.*

1686. *January 8.* The SHERIFF-DEPUTES of EDINBURGH *against* HUTCHISON.

THE two Sheriff-deputes of Edinburgh put in a query to the Lords anent a retour of quinquennial possession of one Hutchison in Newbottle, a traitor, who had been at Bothwell-bridge, whether the calculation of the rebel's five years' possession must be of five years immediately preceding the doom of forfeiture, as the 2d Act 1584 seems to require, or if it must be five years before

the Act of adjournal denouncing him fugitive, some years before the forfeiture ; for they could not prove he was five years in possession before the forfeiture.

The Lords ordained them to take trial of his five years' possession preceding his being fugitive ; because his tenant's possession was reputed to be his possession, and though his tenant had apprised it, yet he could not invert it.

But what if a rebel fly and desert the possession on his committing the crime? Then the quinquennial retour behoved to be from the perpetration of the fact backward.

*Vol. I. Page 390.*

1686. *January 13.* LADY KIRKLAND and JOHN ROBERTSON *against* KIRKLAND'S HEIR.

EUPHAME Seton, Lady Kirkland, and John Robertson her husband, gave in a bill, showing that her first husband was bound to infest her in the liferent of 20,000 merks ; and that, having that sum secured on her father's lands of St Germain's, he had put her name in it ; but she had not accepted of it, because the Earl of Winton, superior, had a depending reduction and declarator that the lands held ward, and likewise that the charter bore a *pactum de non alienando*, and that St Germain's had granted many base infestments, whereby both the legal and conventional recognition were inferred ; and therefore craved the Lords would either ordain Kirkland's heir to infest her in warrandice of that infestment on St Germain's, in case the Earl prevailed, or else that her uplifting her annualrent and jointure out of St Germain's shall no ways import her acceptation of that infestment out of St Germain's to be in satisfaction of the obligation in her contract of marriage.

The Lords having considered this petition, they declared that the petitioner, till the event of the process betwixt St Germain's creditors and the Earl of Winton, may uplift her annualrents out of the lands of St Germain's ; and that the same shall not import her homologation of that infestment in these lands, as if she accepted it in satisfaction of her husband's obligation to her in her contract of marriage, so as to prejudice her recourse against Kirkland, in case Winton prevail ; and remitted the rest of the affair between her and her son to Kemnay, who heard the cause.

*Vol. I. Page 391.*

1686. *January 19.* The LADY NAIRN *against* GEORGE NAIRN.

THE Lady Nairn pursuing George Nairn, the late Lord Nairn's servant and chamberlain, for count and reckoning of nine years' rent of his lands ; he defended himself with partial discharges, and a total one except for half a year ; whereupon he was assoilyed from all proceedings. But she alleging that she only craved inspection of his accounts of charge and discharge, in regard there were several persons craving money for furnishings in my Lord Nairn's time, and which she believes were paid by George, and will appear from a sight of his accounts ; and he having fraudulently put them out of his hands since the communing between the tutors and him, and a little before the citation given him in the exhibition ;—the Lords ordained him to depone where they were, and to exhibit.

*Vol. I. Page 394.*