

1694. *January 5.* MR JOHN HAY of WOODCOCK *against* MR ROBERT JOUSSIE of WESTPANS.

MR John Hay of Woodcock, as factor for the parish of Dalray, against Mr Robert Joussie of Westpans. The Lords repelled his first reason of suspension, that the decret was null for want of an active title; seeing they proved, by his oath, that the codicil and testament were in his own hand, and left by him at London: as also repelled the second, *viz.* that the passive titles were not proven against him, seeing he proponed defences without denying them, and acknowledged intromission with his father's writs: And as to the third, that Robert Inglis, the coëxecutor's representatives were not called, they repelled it also; in respect it appeared that Bailie Joussie, the defender's father, intromitted with all. The Lords only demurred on the fourth reason, that Bailie Joussie, by his oath, had not acknowledged intromission with the superplus estate left in the codicil; and, though it differed from the account he had given in, yet his son contended that the oath ought to be the rule of counting; and, therefore, the Lords declared they would hear them at advising the oath: for an executor is only liable for diligence in discussing the inventory; and when he is pursued by creditors or legators, he is only bound to assign. *Vol. I. Page 588.*

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1694. *January 5.* JOHN IRVING of DRUMCOLTRAN *against* The EARL of LITHGOW.

JOHN Irving of Drumcoltran, against the Earl of Lithgow, for paying him the rents of the forfeited lands of Auchinhay, which belonged to one Fullarton, who was forfeited for being at Bothwel-Bridge in 1679; and whereto Lithgow, being donatar, he had transacted with John Irving, and disponed the lands to him; and from which Irving ALLEGED he was debarred by the forfeited person's brother and tenants, who refused to pay him; and he could not remove them, because the Earl had not given him a charter whereon he might have been infest. The Lords considered that Drumcoltran had been remiss in pursuing for mails and duties, and that Lithgow was in peaceable possession before he denounced himself by that disposition, and that Irving should have continued that same possession; therefore they found it relevant to assoilyie Lithgow from being liable to pay him the rents, if he prove that he was in peaceable possession of the lands at the time of his disposing to John Irving. Some of the Lords thought it reasonable that Lithgow should count to him for the rents of such of the lands as the rebel's brother possessed by a right of wadset: for that was a legal, at least a colourable title to debar Irving from that part till it was discussed by a reduction. *Vol. I. Page 588.*

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1694. *January 5.* GEORGE WATSON and JAMES CHEISLY, his cedent, *against* WILLIAM STEWART, Merchant in Edinburgh.

THE Lords found it would stop all commerce if merchants might retain the

price, on the pretence of offering to prove that the ware was insufficient; after they have acquiesced in it, without protesting, or offering it back, and had sold it; for the *actio redhibitoria*, or *quanti minoris*, only took place, where, immediately upon discovering the insufficiency, it was reclaimed against, and was yet extant and undisposed of. See 7th July 1675, *Paton*. But reserved his action for damages against Cheisly, the cedent, for selling him rotten tobacco, as accords. But it was thought relevant to prove, by his oath, that he sold by samples which were disconform; or that he knew the insufficiency.

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1694. *January 6.* EUPHAM SCOTT, and GEORGE WINRHAM of Eymouth, her Husband, *against* DANIEL NICOLSON, Writer in Edinburgh.

THE Lords advised the probation in the concluded cause pursued by Eupham Scott, and George Winrham of Eymouth, her husband, against Daniel Nicolson, writer in Edinburgh; that the bond whereon he had obtained a decret against her, and on which she had granted him a bond of corroboration, was truly a bond lying blank in her father's charter-chest, and taken out thereof; and Mr Alexander Hay's name, for Daniel's behoof, filled up in it. The Lords found it proven, by the depositions of James Scott, Robert Legett, and others, that it had been a retired bond, and found in Clerkington's charter-chest amongst other papers, and delivered by the said James Scott to Daniel; and therefore they reduced it, and declared the bond of corroboration and transaction made thereon null.

This was only carried by one vote; and, though it was proven that James Scott had taken this bond out of his charter-chest, yet it was not so clear that Daniel was *consciuis fraudis*; and he had acquired it for an onerous cause of debt owing by James Scott to Lands, Daniel's father-in-law, though not adequate.

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1694. *January 9.* LORD PITSLIGO'S CREDITORS *against* The Two Ladies.

ARRRUCHELL reported the competition between the creditors of Lord Pitsligo and the two Ladies. The Lords sustained the old Lady's infertment, being for the principal sum of 4000 merks, notwithstanding it was alleged to be *donatio inter virum et uxorem*; seeing there was no contract of marriage, and this provision came in place of it; and ordained her to be ranked conform to the date of Watson's infertment, who was her trustee. And as to the young Lady, preferred her as to her jointure of forty chalders of victual, because prior to all the creditors' diligence. But, as to her additional provision of ten chalders more in 1687, found the creditors preferable to her therein, unless she can prove that, at the time, her husband had a sufficient visible estate to pay all his creditors, and the additional jointure beside: and repelled that allegiance proponed for her,—offering to fortify it, by proving it depended on two onerous causes, *viz.* the alimenter the children, and the inlake of her principal jointure, which fell short of the forty chalders of victual; for the Lords found she could not canvel