

1695. *February 13.* DICK of GRANGE *against* SIR PATRICK NISBET of DEAN.

PHESDO reported Dick, now of Grange, against Sir Patrick Nisbet of Dean. The Lords found the arrestment was *habilis modus* to affect Sir Patrick's backbond to Lewis Dick, not being to retrocess, but to hold count to him, and make payment of what he received, after deduction of his own debt; such a backbond being reachable no other way; and that Sir Patrick was *in mala fide* to transmit his right to my Lord Strathmore, after he had deponed in Grange's action to make forthcoming; and, though Grange had lain off two or three years, yet the arrestment did not prescribe, being pursued within the five years.  
*Vol. I. Page 669.*

1695. *February 13.* THOMAS INGLIS, and CUMMING his Cedent, *against* JAMES DEWAR in Copilaw.

THE Lords found the heritor of Cranston, Sir James Primrose, had no interest, seeing it was not instructed that he had set these eleven acres in controversy to Dewar, and so could not be liable to him in the warrandice. And it being found, after a visitation, that these acres belong to the Cummings' part, by the measuring and valuation of the birley-men, the Lords preferred this to the tutor's act of sederunt, without hearing the parties; and therefore sustained the Commissary's decret.  
*Vol. I. Page 669.*

1695. *February 13.* SIR JOHN HALL of DUNGLASS *against* BARROWMAN and JAMES GORDON of SETON.

THE Lords found, That the defender's comprisings, not being within year and day of Young's comprising in 1681, which was the first effectual one, infestment having passed thereon, though they were within year and day of Sir John Hall's, yet they could not come in *pari passu* with him; because his was reputed in law to be a part of the first; else, if there were a comprising led every year, that connexion would bring in the last equal to the first. And the Lords had formerly decided thus very justly,—*13th December 1672, Street against The Earl of Northesk; 20th February 1679, Tenants of Morton; 7th November 1679, Straiton.*  
*Vol. I. Page 669.*

1694 and 1695. The VISCOUNT of TARBET, and CREDITORS of SINCLAIR of MAY, *against* PROVOST CUTHBERT'S SON.

1694. *July 19.*—In the ranking of the Creditors, it was objected against Cuth-  
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bert's apprising, That it was null, at least ought to be restricted, in so far as it is made up of most exorbitant penalties and failies; for May having borrowed 2600 merks from him, he had inserted 1300 merks of penalty in the bond, which was highly gross and usurious. *2do*. He had taken a bond apart of £1000 Scots, if May did not relieve him betwixt and a precise day. *3tio*. Having put a caption in execution against May, he took a bond of presentation, under the pain of 500 merks, to present himself within such a definite time; and, without declaring thir failies were incurred, he comprised for them all, extending to 3300 merks.

ANSWERED,—They were all conventional penalties, depending on a liquidation and consent of the parties: they could neither be quarrelled by the party himself nor his creditors.

The Lords, in regard the estate was so overburdened with debt, and that the other creditors offered to quit all their penalties and expenses, therefore they cut off the £1000 and 500 merks of undeclared penalties; and, as to the 1300 merks of conventional penalty in the bond, they restricted it to the usual modification in such cases, *viz.* the fifth part of the principal sum; and declared the comprising should subsist as a sufficient security for that, together with the principal sum and annualrents. As to the modifying and restricting penalties in bonds, the Lords have been always sparing and tender; as appears by the decisions, *20th July 1678, Morrice*; and *21st January 1679, Irvine*.

*Vol. I. Page 635.*

1695. *February 1.*—The competition between Mr Rory Mackenzie and Cuthbert, upon Sinclair of May's estate, mentioned 19th July 1694, was reported. The question was, If an improper wadset was sufficiently clothed with possession, *1mo*. By the back-tacksman's possession; *2do*. By the reservation of a liferent. If it had been the granter of the wadset's liferent, there would have been no doubt in the case; or, if this clause of reversion had been the only constitution of the liferent, there would have been more to say for clothing the base infetment with possession: But it was a reservation of the liferent to a third party. There were several decisions cited from Hope's Minor Practicks, *tit. Of Base and Public Infetments*,—where they may be clothed *vel per constitutum vel per usufructuarium*; also *13th February 1624, ———*; *2d July 1625, Raploch*; *8th July 1626, Turnbull*; *17th November 1627, Clackmanan*; *18th March 1631, Clackmanan*. And the 105th Act, 1540, seems only to brand base infetments with simulation where they are *inter conjunctas personas*, but not *inter extraneos*. But, whatever was the *causa impulsiva* of the act, our law and custom has extended it since.

The Lords ordained this point to be argued in presence. *Vol. I. Page 665.*

*February 14.*—The case, mentioned 1st current, between the Creditors of Sinclair of May, being heard in presence,—the Lords abstracted from the debate, How far a base infetment is either clad *per constitutum vel per reservationem usufructus*: because a clearer nullity was proponed against Cuthbert's charter and seasine proceeding on his apprisings; *viz.* Smith of Braco's wadset is confirmed by Richard Mackenzie, Bishop of Murray, on the 20th of April 1664: Cuthbert's charter from the same bishop and his chapter is dated the last of March and 27th April 1664; and yet the seasine taken thereon is dated the 14th April; but bears, That the charter, its warrant, was only subscribed on the last of March

and 27th April, so it was before the last date of its warrant ; which made it not only null, but false, and gave preference to Braco's wadset, which was confirmed betwixt the first and the second date of the charter ; for it seems, when the Bishop signed on the last of March, there were few of his chapter present, and that occasioned it to have two dates. And the Lords found it was *actus incompletus et inchoatus* till the subscription of the whole was obtained ; and that the last date was the *ultima manus ; et nil putamus factum quamdiu quid restat agendum*. And, though it was offered to be proven that a sufficient number of the chapter signed with the Bishop before the taking of the seasine, yet the Lords preferred Braco's confirmation ; because the seasine was prior to the charter's last date, its warrant. *Vol. I. Page 669.*

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1695. *February 15.* The VISCOUNTESS of FRENDRAUGHT and MORISON of BOGNY *against* DAVID GREGORY of KINNAIRDY.

MERSINGTON reported the Viscountess of Fren draught, and Morison of Bogny, now her husband, against David Gregory of Kinnairdy, for declaring their right, by tolerance, in his moss ; and to refund the damage arising by his disturbing them ; and to discharge him to molest her during her lifetime. ALLEGED,—The tolerance was gratuitous, and for sixteen years, and now expired. The Lords, having read it, found the sixteen years were not restrictive of the first clause, giving it during her lifetime, but related to the son, for sixteen years after his entry. Then ALLEGED,—It bore an irritancy that she should lose the tolerance if her tenants spoiled his grass, &c. ; and offered to prove it. ANSWERED,—*Imo.* He must raise a process ; *2do.* He should have intimated it.

The Lords found it relevant, *first*, to compensate the bygone damages ; and, *next*, to annul the tolerance in time coming, without necessity of putting him to a new process. *Vol. I. Page 669.*

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1695. *February 15.* MACCULLOCH *against* SIR JOHN COCHRAN.

PHILIPHAUGH reported Macculloch against Sir John Cochran, for the price of 100 bolls of meal bought from him. ALLEGED,—I bought it from you, not as your own, but as factor for Sir George Campbell of Cesnock, and as his victual ; and he owes me the equivalent sum. ANSWERED,—By your letter you bid me come and receive the money. But, seeing it was clear he bought it as Cesnock's meal, the Lords sustained the compensation. *Vol. I. Page 670.*

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1695. *February 15.* MR DAVID GOODWILLY *against* SKEEN of HALYEARDS.

PHILIPHAUGH reported Mr David Goodwilly, schoolmaster at Strathmigle,