

burghs and other traders was the Act 1693 ; and such as repudiated the offer of a participation of trade behoved to give over trade, if they would not subject themselves to a share of the burden annexed thereto ; and found they could not plead *bonā fides*, after the public Act of Parliament 1693 : and therefore nominated two of the Lords, with the Reporter, to adjust the quota of thir burghs, for bygones, and in time coming. But, for the period and interval, from the Act 1690 to the Act 1693, found them only liable in the penalties, where they shall be proven to have transgressed the tenor of that Act, in buying staple goods from unfreemen, not burgesses of royal burghs. *Vol. I. Page 710.*

---

1696. *February 14.* SYMPSON and HOME *against* The EARL of HOME.

ANSTRUTHER reported Sympson and Home against the Earl of Home. The Lords found, Though they were served as lineal heirs-portioners to Jean Home, Lady Aiton, yet, she being heir by virtue of her father's tailyie, they could not call for reduction and improbation of that tailyie ; for that were to quarrel their author's right ; so the Earl was not obliged to take a term : But if they insisted, in the exhibition and declarator, that the Earl had amitted his right to the Barony of Aiton, by incurring the irritancy, through assuming the title and dignity as Earl of Home, they might lawfully do the same.

*Vol. I. Page 711.*

---

1696. *February 19.* GRAY of CREIGHY *against* GORDON of AVACHY.

GRAY of Creighy against Gordon of Avachy, for payment of a debt contained in his grandfather's bond. The passive titles were offered to be connected thus :---You represent your father, and he had a disposition to a part of the estate posterior to the contracting my debt. ALLEGED,---A disposition was penal, and like vitious intromission ; which was never sustained to infer a universal passive title, unless established in the party's own lifetime ; because he might have grounds to elide it, and ascribe his intromission, which might be unknown to others ; and even behaviour as heir (which is an heritable passive title,) must be proven against the party while in life ; and it were hard that a disposition to a few acres should, *præceptione hæreditatis*, subject a man to the whole debt. ANSWERED,---There is a great difference betwixt vitious intromission, which is only probable by witnesses, and accepting a disposition *post contractum debitum*, which is instructed *scripto*.

The Lords thought the point new, and ordained it to be heard in presence.

*Vol. I. Page 712.*

---

1696. *February 19.* ARCHIBALD BUCHANNAN *against* BAILIE of WALSTON.

LAUDERDALE reported Archibald Buchanan against Bailie of Walston, for re-

delivery of a manuscript book of receipts he had learned from Mr Sawyers, and sundry other famous mountebanks and physicians. The Lords thought, if it was lost by Walston *casu fortuito vel culpa levissima*, he was not liable; but, finding it was pointed from him, among other goods in a trunk, by his fault, they allowed him to give in a condescence of his damage, and depone *in litem* what he estimates the same to; and he swearing he had rather given 1000 merks than want it, the Lords thought his *præmium affectionis* extravagant; and modified 500 merks, (many voting only £100 Scots,) with this quality, That if Walston recovered the book, and restored it, he should be free.

*Vol. I. Page 712.*

1696. *February 21.* JOHN LOCKHART, now of LEE, Petitioner.

JOHN Lockhart, now of Lee, gives in a bill, representing he cannot yet determine to whom he shall enter heir, because Richard the last heritor has done deeds in contravention of the tailyie, and, if he should serve to him, he could not then be admitted to quarrel his deeds; and he cannot get brieves for serving to Cromwell Lockhart, his eldest brother, seeing he died not *ultimo vestitus et satus*, till he had obtained a declarator, annulling and removing his brother Richard's infetment out of the way; and therefore craved they would put in a factor to manage the estate *medio tempore*.

The Lords considered, that, at the desire of creditors, where fortunes were incumbered, and multiplepointings and competitions depending, they used to sequesterate, but not at the desire of apparent heirs, especially where it was designed to put the relict out of possession of her jointure; and, if the Lords granted factories in this manner, apparent heirs would always lie out and shun the passive titles too: And therefore refused the desire of his bill as it stood.

*Vol. I. Page 714.*

1696. *February 22.* DAVID DEWAR *against* DAVID FRENCH.

[See the prior parts of the Reports of this Case, Dictionary, page 241.]

MR David Dewar, advocate, having complained on David French, agent, that he had uttered irreverent and unbecoming expressions of the Lords; and probation being led thereon, and the same being proven by witnesses, (against whom David French objected as prejudicate, having pleas depending between them, yet were sustained, being *actio popularis*, and the Lords' interest, not that of private parties,) they sent him to prison, and fined him in the sum of 1000 merks, but restricted it afterwards to 500 merks.---*Vid. l. 7. D. ad Leg. Jul. Majest. et L. Unic. C. Si quis imp. maledic.*

*Vol. I. Page 714.*