1698. *July* 5. The EARL of SUTHERLAND *against* The VISCOUNT of ARBUTHNOT.

ARBUTHNOT of Knox, when served tutor-of-law to his nephew, the Viscount of Arbuthnot, gave a bond to the Earl of Sutherland, the grandfather, to count yearly, and for sundry other prestations; and Sir Thomas Burnet of Leyes became cautioner for the performance.

Lord Sutherland craving, by bill, this bond to be given up to him by the clerk, to the effect he might registrate it;---it was ANSWERED, They were content, providing it were only *custodiæ causa*, or for conservation; but to raise inhibition upon it (as the Earl intended,) was invidious. REPLIED,---A party cannot be hindered to make what use of his evidents the law allows him; *Qui jure suo utitur nemini injuriam facit:* And whereas it is craved that he should condescend on the grounds and infractions of the said agreement, seeing, if it be not contravened, it were malicious to make it the foundation of an inhibition, which is infamatory of itself;---it is ANSWERED,---That parties cannot be forced to condescend, but may use what diligence they please upon their peril; and, what if thir parties should put their sons in fee of their lands? May there not be reason to prevent it by an inhibition?

The Lords thought the stopping of diligence like the stopping the circulation of the blood; therefore allowed the Earl to make what use he thinks fit of the said bond, when registrate, as he will be answerable; for, if it should be wholly groundless, the Lords might then redress it, or burden it with expenses.

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1698. *July* 5. FERGUSON *against* CHARLES WILSON.

FERGUSON, merchant in Montrose, gives in a bill, representing, That he had obtained a decreet *in foro* against Charles Wilson, skipper in Musselburgh, for £675, and which he had twice suspended, and always suffered protestations to pass against him, whereby he had put him to near £100 Scots of expenses; and therefore craved, That, besides the protestation-money settled by law, the Lords would coerce this contentious procedure, and give him the expenses contained in his account given in, he deponing upon the verity thereof.

The Lords, without giving the bill to answer, considered, where the law has set down and determined the penalty, by specifying a particular sum, there was no latitude left for judges either to exceed or go beneath that quantity, but the statute must be precisely followed; and the Lords have no *arbitrium* thereupon; and for this cause the Lords refused the bill. *Vol. I. Page* 9.

1698. *July* 8. JOHN BURGAN, and CHRISTIAN DICK, his Spouse, *against* KER and GEORGE FLEMING.

JOHN Burgan, wright, and Christian Dick, his spouse, having pursued Ker,

and George Fleming, her present husband, for payment of a debt due by one Hog, her first husband, as vitious intromissatrix with his goods; and decreet passing against her, she now, in a suspension of that decreet, craves retention of the goods, in respect she had paid all the preferable privileged debts, as the medicaments to her husband, his funerals, the servants' fees, and house-maill.

ANSWERED,—These cannot be allowed now; because they were founded upon before obtaining the decreet, and then repelled because not liquidated nor cognosced. REPLIED,---I have now obtained a decreet of cognition of the same, and they being uncontrovertedly preferable, as they would have defended against the passive title if they had been liquidated then, so they must have the same effect now.

The Lords considered, If the pursuit had been recent after the husband's death, so as there had been no competent time to have constituted herself the creditor in those debts, then she might plead retention now; but, she having suffered three or four years to elapse, the Lords found her liable; else there should never be a confirmation, but relicts would intromit at their own hands summarily, and, when pursued, would obtrude these privileged debts: and that she had not called the creditor who interpelled her to the decreet of cognition; for though, *regulariter*, she needed not cite him, yet, having obtained a decreet against her before she intented the cognition, she ought not to have miskenned him. *Vol. II. Page* 10.

1698. *July* 12. BOSWAL *against* JOHN LOCKHART.

I REPORTED Boswal, glazier in Edinburgh, against John Lockhart, now of Lee. The deceased Cromwell Lockhart of Lee employed this glazier to repair and furnish his house of Lee with new glass, which extended to £200. Cromwell dying shortly after, Boswal applies to Richard, his heir, and obtains his bond for the sum, with this narrative, That it was for work done to his elder brother, Cromwell. He also deceasing, Boswal raises a process against John Lockhart, now of Lee, for payment.

ALLEGED,---Richard, the granter of the bond, was but a qualified restricted tiar, under irritancies, and prohibitory clauses *de non alienando et non contrahendo debitum;* and so the bond can neither affect the tailyied estate, nor yet him, as heir of entail.

ANSWERED,---The bond is not for Richard's own debt, but bears expressly to be Cromwell's debt; and, he being the maker of the tailyie, it is plain, from law, the same falls not under the prohibition of the tailyie, as Stair shows, *tit.* 18, *book* 4, *page* 591; and, though the assertion of an heir of tailyie, that it is his predecessor's debt, cannot be probative, else he might continue debt enough on the estate, yet, to put the case beyond all debate, he offered to prove, in fortification of the narrative of this bond, the work was so truly wrought to Cromwell in his time, and so adminiculate and astruct the verity of its narrative.

REPLIED,---Neither the bond nor its narrative being obligatory, the same could not be now made up by a probation by witnesses, because the account fell