1685. *January.* LORD MARSHALL and TULLOCH his DONATAR *against* THOMAS CARGILL.

AN obligement to dispone a vassal's liferent, escheat to himself, not contained in the procuratory and infeftment, found to be only personal, and not to oblige a singular successor in the superiority.

Page 166, No. 597.

1685. *January* 15. SEMPLE *against* SEMPLE of CATHCART.

FOUND that the defender, in an improbation, could not, after the taking of terms, propone this dilator, That the pursuer was out of the country, and no mandate produced. *Vide* No. 551, [Sir Patrick Hume against the Vassals of Coldinghame, 8th January 1685;] and No. 555, [Oswald against Somervel, January 1685.]

Page 154, No. 554.

1685. *January* 27. ROBERT WATSON *against* LORD KELLIE.

SIR John Kirk, being cautioner for my Lord Kellie for £10,000, bearing annual-rent, got a separate bond of relief, and being distressed, gave a bond of corroboration to the creditor: Robert Watson, donator to Sir John Kirk's single escheat, pursued a special declarator against my Lord Kellie's heirs. Alleged for the defender, That the bond of relief fell not under the single escheat, seeing it ought to be considered of the nature of the principal bond, which was heritable *quoad fiscum*, by bearing annual-rent; 2. Distress, without actual payment by the cautioner, is not sufficient to make the sums of relief to fall to the donator of his single escheat *in causa pene infavorabili*, though a simple distress, *quoad* some favourable effects, be sufficient to make him creditor. Answered, The bond of relief is moveable, seeing it contains no obligement to pay annual-rent formally; and the obligement of relief among cautioners in an heritable bond, is moveable, and, after distress, falls under executry and escheat, &c.; 2. The not actual payment doth not alter the case; for, upon distress, there is *obligatio pura et actio nata*, which falls in escheat as other moveable bonds. The Lords found the obligement of relief did not fall under escheat, unless the rebel had paid the debt; which defence was sustained at the debtor's instance, neither cautioner nor creditor competing. This decision seems irregular.—*Castlehill's Pratt.* tit. *Escheat*, No. 65.

Page 115, No. 433.

1685. *January* 27. The CASH-KEEPER *against* CAPTAIN M'REITH.

IN a competition between one who was creditor to a rebel before his rebellion, and had, after it, obtained a decreet of mails and duties against his tenants and

the donatar of the liferent escheat, who had raised a general and special declarator after the other's decreet;—The Lords preferred the creditor, in respect of his legal diligence, for the same reason that an arrester would have been preferred; though there seems to be this difference, that an arrestment is *nexus realis afficiens rem;* whereas the decreet gives no real interest in the mails and duties till they be recovered: and this point of fact was not clear, whether the mails and duties were for terms subsequent to the annual rebellion, after which the right of liferent in the superior's person is considered as a real public right of the lands, and consequently would carry the duties, and be preferred to a posterior apprising, or voluntary right confirmed, *multo magis* to a personal creditor of the rebel's.

Page 115, No. 434.

1685. *February.* FRANK *against* CUNNINGHAM.

IN a competition for mails and duties betwixt one Cunningham an appriser, and Mr John Frank, as having right from Mr Moubray and his wife to another apprising, whereof she was fiar;—it was alleged for Cunningham, That Mr Frank's right was posterior to a written declaration granted by Mr Moubray, whereby he acknowledged his intromission with more of the mails and duties of the lands apprised than came to his share; and that he was willing that Cunningham, the other appriser, should intromit with the whole mails, till he received as much as Moubray had uplifted more as his share; which written declaration imports materially an assignation, though the paper be not formal; and Moubray's *jus mariti* was conveyable by assignation. Answered for Frank, That the right to Cunningham was but a factory, and could not be obtruded against a singular successor in the right of apprising. The Lords sustained the paper as an assignation.

Page 22, No. 114.

1685. *February.* LORD GRAY *against* The EARL of LAUDERDALE.

THE Lords reduced a right upon a reason of concussion, where there was no transaction or abatement.

Page 155, No. 557.

1685. *February.* JAMES CLELAND *against* PITLIVER.

FOUND, that, in a competition of base infeftment of annual-rent, the first citation and day of compearance before the Lords, was preferable to the posterior citation and first decreet before the inferior judge, where the procedure is more summary than before the Lords. 2. Found, that, in voluntary rights, the first presenting of a right for confirmation was not to be considered, in order to give preference among base infeftments, which is ruled by the date of the charter and seal, because superiors are not obliged to confirm voluntary rights.

Page 166, No. 600.