

1692. *November 30.* The DUKE of HAMILTON *against* ISOBELL DUNDAS and GEORGE CUNNINGHAM.

THE Lords advised the reduction and repetition, *ex condictione indebiti*, at Duke Hamilton's instance, against Isobell Dundass, and Mr. George Cunningham, her husband, of the sum of L.15,000 Scots, the Duke alleged he had paid twice; first by Duke James, to James Mathison, in 1643, and again by himself, in 1669, to Isobell Dundass; and for instructing it, the Duke produced the said James Mathison's discharge, in 1643, which he had only recovered since he made the last payment in 1669. The Lords found it a dangerous preparative to take away writ by witnesses; yet that in cases of trust or fraud it has been often done; and particularly the Duke, in 1688, got a bond annulled on presumptions, being pursued by one Richard Cunningham; and found here, from the writs produced, viz. the decret of review, &c. and from the Duke's own oath, and the whole tract of the affair, that there was no real payment made to James Mathison in 1643, when he gave Duke James that discharge, but that it appears it has been granted at that time when Colonel Mathison was on deathbed, to secure against the Colonel's heir, and that the L. of Innerleith, the heir's assignee, intended a process, which terminated in a transaction, and a sum of money paid him by James Mathison and George Hadden, executors to the Colonel; and that the Duke acknowledged, in his oath, he never found that L.20,000 stated as paid to James Mathison, in any of the accounts of the family of Hamilton; and that the old bond was not given up, but all diligence proceeded on it; and that annual-rent was paid for it after the said discharge, in 1643, and a decret obtained in 1650, and the multiplepoinding raised by the Duke himself, mentioned two bonds, and the existence of an heir.

Therefore, on thir grounds, and on the whole matter, the Lords found there was no double payment, and consequently repelled the Duke's reduction and declarator for repetition; and rejected the retention and compensation craved by him on that head, and found the letters orderly proceeded, allowing to the Duke what he had paid *pendente lite*, which they had modified to her in name of alimment. On the 6th of December 1692, the Duke presented a protestation for remeid of law against this sentence to the king and parliament. *Vol. I. page 524.*

---

1692. *December 1.* ——— *against* The EARL of MURRAY, Defender.

THE Earl of Murray being pursued for a merchant's account, referred to his oath, he craved a commission to depone at Dunybirsell, in Fife, in regard the sum being small, it would put him to as much expenses in coming over. The Lords granted a commission; but in regard the pursuer would either desire to be present, in person, at his deponing, or send one for him to interrogate, they burdened the Earl with the expenses of their journey from Edinburgh, to wait on the taking his oath. *Vol. I. page 525.*