President having restricted the donatives to L.5000 Scots, in regard there was so much given the year immediately preceding; and the rest reclaiming at this modification, and urging that there used never *ad summum* to be given more than L.2000 Scots *per annum*, and that if such donatives had been pursued for by the Officers of State, the Lords could not have sustained process for them as a debt; the President inclined to decern the partners to bear a proportion of what they knew was customary to be given, as if they had tacitly consented thereto: but the plurality of the Lords run, that as to Barnton and Hadden, the two principal tacksmen, they behoved to stand to what they acted, or gave away in common: but refused to sustain it relevant against the assumed parties, what was usual in such cases, or what they knew to have been given before; but allenarly to bear a share of what they consented to, or what they now are content to allow.

*Vol. I. page 533.*

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1692. *December* 20. JOHN DUNCAN *against* MARGARET AIKENHEAD.

JOHN DUNCAN, writer, against Margaret Aikenhead. It was ALLEGED,—That the Commissaries, in order to evacuate the act of Parl. 1690, that particular dispositions needed not be confirmed, they always preferred the nearest of kin offering to confirm, for the benefit of their own quot and dues. The Lords here preferred Duncan, the assignee, to the nearest of kin, though confirmed; and ordained him to get the possession only of all specially disponed, and contained in the two particular inventories under the defunct's hand, of the same date with the disposition, and whereto it relates, and so are a part of it. Some of the Lords inclined to think it only a legacy, and *donatio mortis causa*, seeing it assigned to all she should happen to have at the time of her decease; but the Lords decided *ut supra*, in respect there was a symbolic delivery, and the right bore onerous causes; and they were not, after so long a time, to be presumed to be her husband's, but her own; and they thought that otherwise the late act of Parliament might easily be frustrated and eluded. *Vol. I. page 533.*

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1692. *December* 20. The LADY BROTHERTON, and OGILVY *against* SCOT of Brotherton, and SCOT of Comiston.

THE Lady Brotherton, and Ogilvy, her husband, against Scots of Brotherton and Comiston. The question was, if her liferent, of 1200 merks by year, off her son, should pay the retention of one of six imposed on annual-rents by the act of Parl. 1690.

ALLEGED,—This was an annuity, and no annual-rent; and as it would be free of public burdens, so also of retention; and the 10th act of Parl. 1690, names annuities, but the act imposing retention has *de industria* omitted them.

ANSWERED,—This 1200 merks answered to a principal sum, and behoved necessarily to abide retention, as was found, in 1691, between Mr. Andrew Massy

Regent, and Dean of Guild Crawford; though the contrary had been sustained in favours of Lady Lochend against Sir John St. Clair.

The Lords found this annuity, though innovated by a submission and decreet arbitral, originally corresponded to the principal sum of 20,000 merks, and therefore ought to bear retention. *Vol. I. page* 534.

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1692. *December* 21. SIR ANDREW BALFOUR *against* WATSON of Etherny.

SIR ANDREW BALFOUR, Doctor of Medicine, against Watson of Etherny. This was a count and reckoning about the profits of a Caper, and the prize ships taken by her. The charge being constitute, and the expenses wared out on the Caper, and their loss by its being taken by the Hollanders, being proven only by one witness; the Lords inclined to think it probative now, after so long a time, he having been book-keeper and a common servant and trustee to them both.
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1692. *December* 21. JAMES INNES of Orton *against* WILLIAM FARQUHARSON.

JAMES INNES of Orton against William Farquharson, for payment of 2000 merks, which William's wife had left, having a special faculty in her contract of marriage to do the same. The Lords repelled the first defence, that it was null, being assigned without her husband's consent; for the Lords found his consent to the faculty authorized her sufficiently. As also repelled the second, that she and her husband had uplifted it out of the debtor's hand, and given a discharge of it; for the Lords found, that uplifting did not make it so moveable, as to fall under the husband's *jus mariti*, but it still remained heritable *quoad* the husband, and it was nothing but a change of debtors from one hand to another; and repelled also the third defence, that she renounced her faculty, because that was *donatio inter virum et uxorem*, and so revocable, and *de facto* revoked by her posterior assignation, whereby she exerced the faculty and power reserved to her.
*Vol. I. page* 534.

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1692. *December* 21. JAMES INGLIS, Minister, *against* ABERCROMBIE'S Factor and Tenants in East Barns.

THE Lords refused to repone the said factor to his defence of *bona fide* payment, not only in respect of the circumduction in the decreet *in foro*, but also because his factory only empowered him to uplift and sell the victual, and to pay to the creditors as they should be ranked; and *ita est* Mr. Inglis is preferred to