

fore, they declared they would hear him in June, if he would find caution for his intromission with the rent 1692, and remove at Whitsunday, and cede his possession to the creditors ; and if not, then reduced his right.

*Vol. I. Page 564.*

1693. *February 23.* PATRICK HALYBURTON *against* ALEXANDER ABERCROMBY.

In the pursuit, Patrick Halyburton, bailie of Edinburgh, against Alexander Abercromby, vintner, the Lords sustained this defence of compensation,—That you are debtor to me, in so far as you have drawn a precept on the Duke of Hamilton for an account, and made it payable to me ; I presented it, and the Duke refused, and I protested : though Bailie Hamilton alleged, you should have pursued the Duke. For the Lords found him liable in no farther diligence but to protest for non-acceptance.

*Vol. I. Page 564.*

1692 and 1693. The EARL of TWEEDDALE, Chancellor, *against* WILLIAM ERSKINE.

1692. *November 16.*—In the competition between the Earl of Tweeddale, Lord Chancellor, as lord of the regality of Dumfermline, and admiral within that bounds, and Mr William Erskine, depute to the admiral, anent the right to a whale that ran in at the port of Limekilns ; the Lords, *ex officio*, ordained either party to adduce what probation they pleased, for instructing who first attached the whale and attained the first possession of it. Skeen, *de Verbor. Significat. voce Wreck*, shows, by the English law, whales are *inter regalia*. And the Chancellor repeating a probation, led before the Lords of Secret Council, that he apprehended the first possession, the President thought that it might be advised by the Lords ; but others were of opinion, that such of the witnesses as are alive ought to be reëxamined before the Lords. Which is true *quoad* probation taken by the sheriffs and other inferior courts ; but not as to supreme judicatories, where the brocard, *testibus et non testimoniis est credendum*, takes not place.

*Vol. I. Page 518.*

*December 6.*—In the question between Mr William Erskine and the Earl of Tweeddale, about the whale, mentioned 16th November last, the Lords having considered the reference of the Privy Council, they would not permit the question of possession to the point of right, but would take them both in together ; especially seeing they proponed *peremptoriè* on the Duke of Lennox's right of admiralty, from whom Sir William Erskine derived a deputation by progress ; and that it should be found better than Tweeddale's.

*Vol. I. Page 527.*

1693. *January 26.*—The debate between the Earl of Tweeddale, Lord Chancellor, and Mr William Erskine, about the whale, mentioned 6th December 1692, was advised ; and the first question was, Whether they should consider the point of right, or possession, first, or if they were to take them jointly and

complexly. And the Lords considered, that they had forced them to debate the point of right; therefore, they resolved to begin with it. But then it occurred, they had not an *idoneus contradictor* in the field; for the Duke of Lennox being heritable admiral, and not called, they could not judge on his right, on the partial production made for him by Mr William Erskine, without his special mandate, (being out of the kingdom,)—*viz.* the king's letter in 1628, which was never perfected; and the ratification of Parliament in 1633, which gives no new right: therefore, all they could do was to find the Chancellor's right the best, for any thing yet seen. But this preference being of no value, they were allowed to be farther heard; and it was argued, whether such offices could have the benefit of a possessory judgment; for though such escheats occur but rarely, yet they had the daily exercise of the jurisdiction, by other acts of holding courts, judging prizes, granting passes and cockets, &c. *Vol. I. Page 551.*

*February 17.*—In the case between the Earl of Tweeddale, Chancellor, and Mr William Erskine, about the whale, mentioned 26th January 1693, the Lords having advised the acts of possession adduced for the Chancellor, to prove he had exercised a jurisdiction of admiralty in his lordship of Dunfermling, and interrupted the high admiral's right; the Lords found his deeds of possession proven: though it was alleged they were, by his rights, as lord of the regality. For the Lords considered, where a man has two titles, the possession is always to be ascribed to that whereunto it most naturally belongs; and so found these fines and acts of Court were as admiral. This carried only by the President's vote. *Vol. I. Page 562.*

*February 23.*—The Lords having advised the value of that whale, controverted between Mr William Erskine and the Chancellor, as mentioned 17th current, they decerned for 700 merks, as the price the Chancellor had sold it at; but with this quality, that if Mr William instructed that he got no more for it at the roup but 500 merks, they restricted it to that price.

*Vol. I. Page 564.*

---

1693. *February 23.* The DUKE of HAMILTON *against* JAMES YOUNG, his Chamberlain.

THE Lords found the mill-rent differed here from land-rent, and that the discharge of his accounts, which he got in 1683, did not extend to, nor comprehend a discharge of his intromissions with the rent of this mill for the year 1684; though it was alleged, that what was grinded in the year 1684 behoved necessarily to be but the corns of 1683, and so it was a year behind. Which the Lords repelled, having considered his entry and the custom of the place.

*Vol. I. Page 565.*

---

1693. *February 23.* DAME MARY ERSKINE, Lady Ardoch, *against* SIR PATRICK NISBET of DEAN, the LADY ROSLINE, and COLONEL RAMSAY.

In the report, Dame Mary Erskine, Lady Ardoch, *against* Sir Patrick Nisbet