

1694. *January 5.* MR JOHN HAY of WOODCOCK *against* MR ROBERT JOUSSIE of WESTPANS.

MR John Hay of Woodcock, as factor for the parish of Dalray, against Mr Robert Joussie of Westpans. The Lords repelled his first reason of suspension, that the decret was null for want of an active title; seeing they proved, by his oath, that the codicil and testament were in his own hand, and left by him at London: as also repelled the second, *viz.* that the passive titles were not proven against him, seeing he proponed defences without denying them, and acknowledged intromission with his father's writs: And as to the third, that Robert Inglis, the coëxecutor's representatives were not called, they repelled it also; in respect it appeared that Bailie Joussie, the defender's father, intromitted with all. The Lords only demurred on the fourth reason, that Bailie Joussie, by his oath, had not acknowledged intromission with the superplus estate left in the codicil; and, though it differed from the account he had given in, yet his son contended that the oath ought to be the rule of counting; and, therefore, the Lords declared they would hear them at advising the oath: for an executor is only liable for diligence in discussing the inventory; and when he is pursued by creditors or legators, he is only bound to assign. *Vol. I. Page 588.*

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1694. *January 5.* JOHN IRVING of DRUMCOLTRAN *against* The EARL of LITHGOW.

JOHN Irving of Drumcoltran, against the Earl of Lithgow, for paying him the rents of the forfeited lands of Auchinhay, which belonged to one Fullarton, who was forfeited for being at Bothwel-Bridge in 1679; and whereto Lithgow, being donatar, he had transacted with John Irving, and disponed the lands to him; and from which Irving ALLEGED he was debarred by the forfeited person's brother and tenants, who refused to pay him; and he could not remove them, because the Earl had not given him a charter whereon he might have been infest. The Lords considered that Drumcoltran had been remiss in pursuing for mails and duties, and that Lithgow was in peaceable possession before he denounced himself by that disposition, and that Irving should have continued that same possession; therefore they found it relevant to assoilyie Lithgow from being liable to pay him the rents, if he prove that he was in peaceable possession of the lands at the time of his disposing to John Irving. Some of the Lords thought it reasonable that Lithgow should count to him for the rents of such of the lands as the rebel's brother possessed by a right of wadset: for that was a legal, at least a colourable title to debar Irving from that part till it was discussed by a reduction. *Vol. I. Page 588.*

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1694. *January 5.* GEORGE WATSON and JAMES CHEISLY, his cedent, *against* WILLIAM STEWART, Merchant in Edinburgh.

THE Lords found it would stop all commerce if merchants might retain the