

ment they met with was only *via facti*, by driving away their goods off the ground, and hindering them, *manu forti*, to possess; and that warrantice only signified against legal and warrantable deeds; and if they had no right to debar you, then you might have pursued them for a riot, and got yourself repossessed by order of law.

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1694. *January 24.* JAMES CHAPMAN *against* ————— CHAPMAN.

JAMES Chapman against his brother of the second marriage, for reduction of a discharge he had given his father, of his mother's contract of marriage, on fraud and force; that, being in prison for 100 merks, his father offered to liberate him, if he would grant him that discharge; and that, being in the hands of a parent, he would only use it as a check; if not, he would let him rot in prison. ANSWERED,—That his discharge, bearing sums of money, could not be taken away by witnesses, especially the father being now dead, and he silent during all his life. The Lords, upon report, found the presumptions strong; and therefore, before answer, allowed the writer and witnesses to be examined,—what was the onerous cause of the discharge,—and what was the communing then,—and if the father used either threatenings or promises. As also, allowed the defenders to astruct the discharge, and adminiculate its onerous causes as they shall think fit.

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1694. *January 25.* ANDREW BOWER *against* ROBERT MITCHELL.

ANSTRUTHER reported Andrew Bower against Robert Mitchell. ALLEGED,—That no execution could pass on a bond payable on demand, by a charge of horning, till first requisition were made, at least the money demanded; seeing the requiring was the term of payment, and none could be charged before the term, for that was to begin at execution. The Lords found, That, whatever civility or good manners might oblige a man to, yet, in law, he needed not advertise the party; and that the charge on the King's letter was a sufficient demanding: and were so displeased with this trifling defence, that they recommended to the Ordinary who heard the cause, to modify expenses, besides the penalty of the bond.

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1694. *January 25.* The CHILDREN of WILLIAM ROBERTSON *against* HOME of KYMERGHAM.

RANKEILLER reported the Children of William Robertson, merchant in Eyemouth, and their Tutors, against Home of Kymergham, for the price of some timber their father furnished to him when he was married to the heiress of Ayton. ALLEGED,—It was not delivered to his factor, but his Lady's, and was applied for the girnels at Ayton; and his interest *jure mariti* having quickly

ceased by the dissolution of the marriage, the heir-male who succeeded to the lands, and got the benefit of these reparations, ought to be liable for the same, and not he,—the debt not being constituted against him during the marriage. The Lords considering he had an annuity out of the estate, and so was *lucratus*, they found him *primo loco* liable; reserving his recourse against the Earl of Home, now the heir-male, to whom it eventually proved to be *in rem versum*; for they thought the merchant not obliged to consider his separate distinct interest from the Lady, and to what use the timber was applied; which could not be instructed, he being now dead, whose oath could have cleared whose faith he had followed, if it had been sought in his lifetime. *Vol. I. Page 598.*

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1694. *January 26.* DAVID GORDON *against* URQUHART of MELDRUM.

PRESMENNAN reported David Gordon, son to Mr Thomas Gordon, against Urquhart of Meldrum, on a bond of pension bearing to be payable during Mr Thomas's life. ALLEGED,—It was a mandate, and expired with Meldrum; and he did no service after. ANSWERED,—It was for bygone services as well as to come; which had been often sustained:—as *3d December 1661, Jamison against M'Leod*; and in *Sir John Nisbet of Dirleton's case against the Earl of Galloway*, and *Pitmedden's against the Earl of Winton*, even after they were Judges. The Lords sustained the bond, conform to its tenor; and would not restrict it. *Vol. I. Page 598.*

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1694. *January 26.* DAVIDSON of BALNACRAIG *against* ALEXANDER LINDSAY.

THE Lords found these words of the partial receipt, declaring it was in part payment of a greater sum, behoved to be ascribed in payment of the bond *primo loco*, and of the tack-duty only in the next place: because the victual in the receipt was liquidated at a far greater price than the victual was modified to in the tack; and if the creditor had been asked, at the time, in payment of which of the two sums he took it, he would certainly have answered for the bond; because he had none bound in it but this bankrupt tenant; whereas, in the tack, he had a cautioner; though a debt due with a cautioner is *durior sors* (to which law commonly ascribes it,) than a debt without one. *Vol. I. Page 598.*

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1688 and 1694. AYTON of INCHDERNY *against* ALEXANDER NAPIER.

[See the prior, intermediate, and posterior parts of the report of this Case, Dictionary, pages 12,609 and 11,479.]

1688. *January 13.*—THE case of Ayton of Inchdernity and Alexander Napier, mentioned 11th December 1686, was debated upon a new point,—If a re-