

1693 and 1694. ALEXANDER MAITLAND *against* The DUCHESS of LAUDERDALE.

1693. *January 18.*—THE LORDS followed the interlocutor they had given *supra* in the Lady Boghall's cause against the Duchess; and found the notorial extract of the testament, with the testificate of Lieutenant Eivill at Paris, probative; and found, though this was not *legatum speciei*, (not being of the jewels themselves, but only out of the price of the jewels when sold,) yet it was *onus reale*, and a hypothec on the jewels, they being disposed by the Duke to the present Duchess, he having no right to them; because, being *paraphernalia et mundus muliebris*, and the ornaments of her body, and though of a great value, they were *extra communionem bonorum*: and found, if the Duchess's intromission with these jewels, since her Lord's death, be proven, she ought to be liable to the legacies *juxta valorem*; but assoilyed the Duchess from the article of £700, as the debursed expense in building the Mains at Leidington, though she had succeeded in the right of that land by a gratuitous disposition, seeing the Duke was not bankrupt; but sustained his allegiance, That she promised him payment of it;—to be proved by her Grace's oath. *Vol. I. Page 547.*

1694. *December 14.*—Alexander Maitland and Hary Hamilton, against the Duchess of Lauderdale, about the legacy of the jewels. The Lords varied from what they did before, (18th January 1693;) and now found it was not *speciale legatum*, the jewels themselves not being left, but a legacy out of the price of them; as also, that there could be no *onus reale* here on the jewels, they being appointed by the Countess's testament to be sold, and so might freely be transmitted as any other moveables; and that the Duke, having got them from the Lady Boghall, and given them to his Duchess, she cannot be liable, the Duke being then in an opulent and solvent condition, (though his estate be now encumbered;) and he having got the Lady Yester's right, who was nearest of kin to the Countess, and having confirmed the testament, it gave him a sufficient right to the jewels, besides his right *jure mariti*, except the *paraphernalia*, which the Lords interpreted to be her *mundus muliebris*. But the Lords thought, if there were any force, threats, or concussion in the way, by which the Duke caused get up the jewels at Paris from the Lady Boghall, that this would be *vitium reale*, and make the Duchess still liable for thir legacies; seeing *actio metus est in rem*. *Vol. I. Page 650.*

1694. *December 14.* MR ALEXANDER COUTS, Minister at Strickathrow, *against* CARNEGIE of COCKSTON.

By a minute, Coutts was bound to dispoine to Cockston all right, in his own and his wife's person, of some lands, and to deliver up the writs, and particularly an adjudication led on a bond granted by themselves. When implement is sought of this minute, he offered to dispoine any right he had in the general, but not the adjudication; because that would infer a passive title, conform to the act of sederunt 1662, in the case of *Glendining against The Earl of Nithsdale*;

but he was willing to give it up to be cancelled; and offered to prove, by the comuners, that this was all that was treated on.

The Lords found the contract signified nothing if it did not oblige him to dis-
pone the adjudication also; and refused to examine witnesses anent the meaning
thereof; thinking it clear enough of itself, and to be interpreted against him
qui potuit legem apertius dicere. *Vol. I. Page 650.*

1694. December 14. The CREDITORS of SCOT of ARDROSE *against* GEORGE
GRAHAM and the LADY LARGO.

THE Creditors of Scot of Ardrose, against George Graham and the Lady
Largo, who opposed the sale of these lands; because, by a condescendence and
agreement, there were lands given off for three parts of their principal sum to
all that should subscribe and enter into the said agreement; and the Lady
Largo had lands effeiring to the fourth part of thir sums; and Spence's ap-
prisings, acquired in by Sir Daniel Carmichael, which was the preferable right,
was communicated to them.

The Lords found, they having divided the lands amongst them in this man-
ner, they were proprietors of their several localities, and could not be forced to
consent to a roup of these lands except they pleased; and that Sir Daniel's oath
did not restrict his apprising, as was alleged, but only showed the inductive
cause why he acquired it to secure his other debts. *Vol. I. Page 651.*

1694. December 14. SIR JAMES COCKBURN *against* SIR ROBERT MILN of
BARNTON.

RANKIELER reported three points in the count and reckoning between Sir
James Cockburn and Sir Robert Miln of Barnton. The *first* was, Whether Sir
Robert was bound to produce instructions for the £1200 which Sir James yet
wanted of the £24,000 of the salt sent abroad the time of the preëmption in
1673. The Lords thought the presumption lay against Sir James; seeing he
confessed he had got the instructions of the £23,000, and, by virtue thereof,
had uplifted; that it was probable he had also gotten the rest; and therefore or-
dained Sir Robert Miln to depone if he has any of these instructions, or if he
delivered them.

The *second* was, Who was to be at the expense of the collectors' salaries the
time Sir Robert had it? The Lords found, seeing the profit thereof was made
over to Sir James, the *onus* followed the *commodum*, and he behoved to undergo
the burden thereof.

The *third* was, anent the account of charge and discharge given in by Sir
Robert, whereby he charged himself with £17,000, and in the same writ dis-
charges himself; but does not produce the instructions, alleging they were
burnt with his house at Leith in 1682; though regularly you cannot both *ap-
probare et reprobare*, and you must not divide the writ, but take it complexly