tures; and the Acts of Parliament exeme from cess for a time, but never meant such private transactions as a bond of thirlage: and, by casting their lands into grass, they might as well plead to be free of parsonage-teinds, because they have no arable ground bearing corn.

The Lords saw inconveniencies on either hand. Every heritor ought to have the free disposal of his own property for his own advantage; and yet you ought not to use it so as to deprive me of that which is reputed a fixed rent, and uses to be bought and sold. For clearing the case, and fixing marches, the Lords declared they would hear the cause in their own presence. A partial abatement of multure would be less regarded, where one converts a part of his ground from arable to pasturage, for his own advantage, and not *in æmulationem vicini vel domini superioris*; but a total extinction deserves a farther inspection.

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1704. *June 27.* SIR JOHN MALCOLM of INNERTEIL *against* The EARL of ROSEBERIE and the OFFICERS of STATE.

THE deceased John Malcolm of Balbedy, father to the said Sir John, had the gift of the chamberlainry of Fife from King Charles I. in 1644, and got it thereafter renewed by Charles II. in 1664 to himself, and, after his decease, to the said Sir John his son. Balbedy having refused the test in 1681, the said office was conferred on Mr George Bannerman; and he dying after the Revolution, King William gifted it to Sir John Dempster of Pitliver; and, on his death, Queen Anne gave it to the Earl of Roseberie *durante beneplacito*. Sir John Malcolm, having qualified himself by taking the oaths to Queen Anne, raises a declarator against the Earl of Roseberie and the officers of state, to hear and see it found and declared, that he has the only good and undoubted right to the said place, and ought to be put in possession thereof, being now qualified according to law.

ALLEGED for Roseberie,---That Sir John had lost and amitted the said office by his father and his own not taking the test, and, since the Revolution, by not taking the oath of allegiance to King William, conform to the appointment and limited time of the 6th Act of Parliament 1693, declaring all persons not taking the said oath should, *ipso facto*, lose their offices; and accordingly the same was filled on the vacancy, by putting in the persons above named into the same.

ANSWERED,---His father's omission to take the test could not prejudge his reversion and survivancy, seeing he could not regularly enter during his father's lifetime; and he survived the Revolution several years, during which time he could not have access to the exercise of that office. Neither is it any objection or obstruction, that he did not qualify himself sooner, because he, having the gift during life, might claim it, or make use of it when he pleased; even as a tutor of law may enter when he will, and remove a tutor-dative from the office. And the Act of Parliament 1693 speaks only of them who were actually in office, or should thereafter enter to the exercise thereof, that they be deprived if they officiate before they take the oath; which is not his case: for he had only a reversion, survivancy, and claim, and did not attempt to exerce till he had first quali-

fied himself; and he was not seeking any of the bygone profits or emoluments of the place, but only in time coming.

The Lords thought, if there had been a small interval of time betwixt his father's dying and his qualifying himself, in order to his succeeding him in the office, there might have been something pled for Sir John; but he having lain off for eight or nine years after his father's decease, without qualifying, there was no reason that King William should have waited his leisure so long ere he should declare his acceptance: and therefore the same being filled then by Pitliver, and now, since his death, by my Lord Roseberie, they repelled Sir John's declarator as irrelevant; and assoilyied therefrom; and preferred Roseberie's gift and letter of chamberlainry.

Upon the pronouncing of this interlocutor, Sir John appealed to the Parliament, and protested for remedy of law against the injustice and iniquity of the sentence. *Vol. II. Page 233.*

1702 *and* 1704. JEAN NISBET and SIR WILLIAM SCOTT of HARDEN, her HUSBAND, *against* WILLIAM MORISON of PRESTONGRANGE.

[See the first part of this Case, Dictionary, p. 5011.]

1702. *November* 19.—SIR William Scot of Harden and his Lady pursue William Morison of Prestongrange, as executor to the late Lady Dirleton, his sister, for repaying some debts intromitted with by her, which the Lords had found to belong to the Lady Harden. Prestongrange craved compensation and retention for the charges wared out on my Lord Dirleton's funerals. *2do*, For putting herself, family, and servants, in mourning. *3tio*, For the aliment and entertainment of the family, from the 9th of April 1688, on which day my Lord died, till the beginning of June; wherein Whitsunday happened, being the next term after her decease. The Lords coming to advise the cause, they repelled the compensation founded on the funeral expenses; because, as Prestongrange proved nothing of his sister's disbursing any part of it, so it appeared, by the testimonies of sundry witnesses adduced, that £200 sterling was taken out of the lying money beside my Lord Dirleton the time of his death, which was wared on his burial. As to the other two articles, Prestongrange gave in a condescendence, and craved a diligence to prove the same; seeing, after fourteen years, it is hard to expect a full probation of such disbursements. The Lords refused a diligence; but allowed them to be heard on the particular articles acclaimed, and declared they would modify the same. And Prestongrange craving £1800 Scots for her personal mournings, and about £900 Scots for putting the family, her bedchamber, the church-seats, her chair, and coach in black; and alleging that custom had of late made that expense greater than formerly, and respect was to be had, in the modification, both to his fortune and the honourable posts he had borne in the state; yet the Lords, instead of the £2700 craved, modified only £1500. And, there being £1800 Scots stated for alimenting the family to the next term, being near the space of two months, some proposed, that regard, in this modification, was to be had to what my Lord Dirleton used to spend yearly in his family. But the Lords, by a general conjecture, allowed only L.600 Scots for that two months' aliment.