

ordained him, on the passing of this bill of suspension, to find caution; though it was alleged by some, that this was to put the Duke of Hamilton out of possession.

*Vol. I. Page 581.*

1695. *January 16.*—Arbruchel reported Ellieses and their husbands against James Hamilton of Aikenhead and the Duchess of Hamilton, who had a decret of declarator for the maills and duties of thir lands, holden of the Duchess, and whereof the rests were assigned to the deceased Mr John Ellies, and now fell to his daughters.

The Lords found the assignation, being posterior to the citation of non-entry, whereon a decret followed for thir very rents, the superior was preferable to such an assignee or singular successor. But, in regard the same was not all uplifted out of the lands holden of the Duchess; therefore, the Lords ordained them to be proportioned accordingly as they were actually uplifted; and, if that cannot appear, then conform to the value of their respective lands. The Lords confessed this preference of the superior was *durum; sed ita lex scripta est*, till these feudal delinquencies be rectified.

*Vol. I. Page 659.*

1695. *January 17.* MR JOHN SINCLAIR OF BALGREIGIE *against* DOUGLAS OF STRENDRY AND OTHERS.

THIS was a declarator of his right of servitude in a great adjacent commonty. The Lords found, the adjacent heritors, who had right there and possession, might debar him, unless he showed a constitution, either by forty years' possession, without interruption, or that Balmuto, who entered into that contract in 1588, was his author in these lands, and was then heritor undenuded, and that he derives right from him by progress; for the Lords did not think the presumption of his being then so designed, sufficient to prove he was heritor, unless it were otherwise instructed. And, though some argued, that contiguity to a muir, with the clause *cum communi pastura*, gave a sufficient right, the Lords thought this not effectual to begin a prescription as a title; but would not give it without possession.

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1695. *January 17.* MR JOHN SINCLAIR OF BALGREIGIE *against* INGLIS OF EASTERBOWHILL.

ARNISTON reported Mr John Sinclair of Balgreigie against Inglis of Easterbowhill, for declarator of his property of a piece of land called the Strudders. The defence was, Prescription, by forty years' possession.

ANSWERED,—Interrupted by liferents, during which time they encroached.

The Lords found the liferenter's possessing by his right, he was *valens agere* to have hindered them either *via facti vel juris*; and so could make no interruption.

Then, *2do*. ALLEGED,—It was excepted out of his right, flowing from Abraham Thomson, then rector of Auchterdiran.

ANSWERED,—That was only a right of the east half of Balgreigie, whereof this roun was no part; therefore, it was justly excepted: but afterwards he acquired the west half, whereto it did belong.

The Lords repelled the defence in respect of the answers.

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1695. *January 17.* DOUGLAS of KIRKNESS *against* AYTON of INCHDERNY.

DOUGLAS of Kirkness against Ayton of Inchdery, in an exhibition *ad deliberandum*. The Lords were clear, that an apparent heir might call for inspection of the moveable estate, as well as the heritable and real; because, otherwise, he could not deliberately know whether it was *hæreditas lucrosa* or *damnosa*; and that *quoad* all writs granted to the defunct, and all granted by him to his wife, children, servants, and others *in familia*, but no further: as was solemnly decided, *6th December 1661, Telfer against Sornbeg*. But, in regard the defender clothed himself with a simple and absolute disposition from the defunct, therefore they refused process, the defender producing that right, which totally denuded the defunct; but, if it bore any reservations, conditions, or qualities, it would be otherwise.

*Vol. I. Page 660.*

1695. *January 17.* JOHN ROBSON *against* ROBERT BURNET, Writer to the Signet.

PHILIPHAUGH reported John Robson against Robert Burnet, writer to the signet. This was a reduction of a disposition *ex capite lecti*. The ANSWER was, You, the apparent heir, have ratified.

REPLIED,—I have raised a reduction of that ratification on fraud and circumvention.

When this was first called, the Lords allowed the writer and witnesses in the disposition to be examined upon the matter of fact; which was done; and Robert Burnet urged to have their depositions advised. But the other party craving a farther probation, on the various circumstances and qualifications of the fraud, and that the first probation was only *ad specialem effectum*, to see if he had malversed in his trust as a writer, and was before answer; the Lords allowed both a mutual probation, on the points alleged by them, before they would conclude the cause.

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1695. *January 17.* DAVID SPENCE, Writer, *against* DAVID DONALD of SHANGIE.

THE objection against the title was, That, being subscribed by two notaries,