

When the action was called,---Mr Murray shunning to produce his gift, and debate *in causa*, but rather let it pass in absence, without dipping on the validity of the two gifts,---the Lords refused his bill of advocation ; but Sir Walter craving the Lords would recommend him to the commissaries to admit him, the same was declined, and the commissaries left to do as they would be answerable.

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1699. *February 1.* GEORGE MARSHAL *against* WILLIAM ALVES.

GEORGE Marshal pursues a reduction against William Alves, writer, of a decret of general declarator of the escheat of umquhile William Russell ; and the first nullity insisted on was, That the citation was only upon six days, whereas, by the Act of Sederunt, 21st July 1672, special declarators, and other summonses there enumerated, have that privilege, but not general declarators, which must be on twenty-one days as before. ANSWERED,---The writers to the signet had since that time raised them on bills, as privileged ; which ought to support his diligence. REPLIED,---The privileges are but impetrated *periculo petentis*, and cannot alter a fixed custom. Likeas, it was alleged,---That Mr Marshal had no interest to object against his declarator.

The Lords found the citation unwarrantable, but sustained it as a libel, and allowed the parties to be heard how far George had an interest.

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1699. *February 2.* GEORGE COLVIL, ISOBEL and CATHARINE PRESTONS, and OTHERS, Creditors to Preston of Valeyfield, *against* GEORGE CLERK.

GEORGE Colvil, Isobel and Catharine Prestons, and other Creditors to Preston of Valeyfield, pursue George Clerk, bailie of Edinburgh, and tacksman of that estate, for their bygone annualrents. ALLEGED,---By the articles of the roup, by which that estate was set to him in tack, he has allowance and retention, out of the fore-end of his tack-duty, of whatever expenses he wares out in finishing the former coal-sinks, or setting down of new ones ; and so it is, most of the rent has been expended in recovering the coal. ANSWERED,---Thir annualrents are not infest in these parts of the lands where the coal is sought, but in other particular rouns ; and, as they would have no benefit by the coal, so they ought to sustain as little prejudice thereby ; and the land-rent, wherein they stand infest, ought not to be applied for supporting or defraying the expenses of the casual rent wherein they have no interest, but the same was to be adjudged *singula singulis*. REPLIED,---By the tack, both real and casual rents are set to him jointly and indistinctly *per aversionem*, and he pays a promiscuous duty for both ; and no reasonable man would have engaged for so great a tack-duty in contemplation mainly of the profit to be gained by a coal, if he had not been allowed to retain for his expenses out of the whole head ; for, in law, *impensæ utiles et ne-*

*cessariæ ipso jure minuunt fructus rei locatæ et mercedem inde debitum.* DUPLICED,---The annualrenters protested at the roup that these articles should not prejudge them.

The Lords found, That such creditors as were not infest in the coal, but in rooms where the coal was not wrought, had no concern to be burdened with the expense in seeking the coals, but behoved to get their annualrents effeiring to the rents of these rooms in which they were infest. *Vol. II. Page 40.*

1699. *February 2.* CUNNINGHAM of BOQUHAN *against* The LAIRD of LECKIE.

THE Laird of Leckie, having procured a visitation of the Presbytery of Stirling, in 1687, of the church of Gargunnoch, he was permitted to erect a loft above Cunningham of Boquhan's seat in that church, which darkened and obscured his sight; and Boquhan, procuring a new visitation since the Revolution, to get himself redressed of the injury done him, because he was of the Presbyterian persuasion, and Leckie having raised an advocation, the Lords, by an act, before answer, took trial of the affair;—and this day, advising the probation, Found sundry encroachments had been made on Boquhan's seat and burial place, and the scutcheons of his family removed, and stoops posted on their graves, &c.: Therefore reduced that visitation; and ordained the loft to be taken down, and the church to be put in the same case it was in before; and, lest there should be any opposition, commanded the Sheriff of Stirling to see it executed; and, if he were remiss in doing it betwixt and the 20th of February, then appointed letters of horning to be directed against him for that effect.

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1699. *February 3.* CLERK *against* JOHN WARDEN.

JOHN Warden, and one Clerk, being heritors, *pro indiviso*, of a piece of land, there is a division, by the Sheriff of Lanark, made in 1653; and, in prosecution thereof, a contract entered into by a letter of couch, whereby marches are set betwixt them. One who marries Clerk's daughter, and thereby gets his share, pursues for a new mettage and division. Warden ALLEGES,—The Sheriff's division, and the contract thereon, must be the rule; and there can be no new division, which is sought from no other design but *in æmulationem vicini*; because Warden has much bettered and improven his half, and Clerk, by his sloth, has deteriorated his. ANSWERED,---The contract may bind the parties entering therein, but not the pursuer, who is a singular successor, having right thereto by contract of marriage, and knows nothing of that private agreement; *et rerum dominia non transferuntur nudis pactis sed traditionibus*; and, by our law, no foot of ground can be possessed in Scotland without a seasine, except minister's glebes; *Nulla sasina, nulla terra*; and, in case of excambion of small parcels of