

1694. *February 15.* ALEXANDER JOHNSTON of ELCHIESHIELS, *against* Mr JOHN MONTGOMERY, Writer to the Signet.

PRESDO reported Alexander Johnston of Elchieshiels, against Mr John Montgomery, Writer to the Signet, anent the imputation of some money Elchieshiels paid to John Muir, in part of a greater sum. The receipt bore, In part of payment of the bond, ticket, and account.

The Lords found the debtor had the application, and that, accordingly, he had ascribed it to the bond *primo loco*, which must be understood of the annualrents. And, in regard there were two bonds, one due to himself primarily, and the other only by an assignation unintimated, the Lords found the indefinite payment would ascribe to the first bond, to extinguish it *in totum*, before it could exhaust any part of the second bond, and then to the annualrents of it; and, *tertio loco*, to pay the *sors*; and, last of all, to the ticket, and the account.

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1694. *February 15.* MR JAMES FENTON *against* SIR ALEXANDER COCKBURN of LANTON and his CREDITORS.

PRESMENNAN reported the case of Mr James Fenton, against Sir Alexander Cockburn of Lanton and his Creditors, craving he may be put in possession of the little roun of Winsheels, wherein he stands infest, preferable to all others; and which will not pay him the annualrent of his sum,—in regard, by the general factory granted to Lanton, he also intromitted with this roun, and did not pay him his annualrents.

The Lords thought the desire reasonable, and ordained Mr James to have the possession and disposal of that piece,—with this condition, that, if it should happen to pay more than his annualrents, he should be accountable for the superplus.

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1694. *February 15.* LAWSON of CAIRNMUIR *against* JOHN KENNEDY, Apothecary.

LAWSON of Cairnmuir, against John Kennedy, apothecary, for implementing the contract of marriage with Bailie Lawson's wife's mother, whereby he was obliged to provide the heirs, or bairns of the marriage, to the sum of 10,000 merks, and to all the conquest during the standing of the marriage; and Bailie Lawson's wife was the only child of that marriage.

The Lords found he was obliged to fulfil the specific obligation of the 10,000 merks, and that he ought to secure her presently in it, payable at his death; but so as that it did not tie him up from necessary deeds; only he could not gratuitously exhaust it. But, as to the other conclusion of the libel, that his conquest during the continuance of that marriage should be liquidated by his oath, the Lords demurred exceedingly on it; thinking it would weaken and dissolve the paternal authority, and be a seminary of pleas for children against their parents;

and that the conquest could no more be known before one's death, than, Solon said, a man's happiness could be determined sooner; and that this clause of conquest was only a mere destination. On the other hand, it was argued, that there was no other way of constituting and liquidating the conquest but by the father's oath; and, if it were delayed till after his death, it would occasion an inexhaustible nursery of pleas among the children of several marriages, who, through the changing of bonds from one hand to another, could never clear when it was first conquest. And that they sought the liquidation for no other effect, but only that it might be known: for, neither could any inhibition be served thereupon, neither could it impede his rational deeds of administration; so that he might bestow a part of the first conquest on a wife and children of a subsequent marriage, or on other just and necessary affairs; and that, in trading merchants, clauses of conquest did not bind them to implement, because that would mar traffic; but that held not in others. And, in their favours, they cited Durie, 13th February 1677, *Fraser*. The Lords, finding inconveniences on both sides, declared they would hear it *in præsentia*. *Vol. I. Page 609.*

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1694. *February 16.* MR ROBERT CHALMERS *against* MR THOMAS CHALMERS of GOGAR, his Brother, and JOHN COOPER, *alias* CHALMERS, his Son.

THE Lords found the reason of reduction relevant, that Mr Thomas, after the pursuer's inhibition, did renounce, in favours of Sir John Cooper of Gogar, the wadset he had on Gogar for 80,000 merks; unless Mr Thomas will say that he got an equivalent security for it, and to which his creditors might have access; and that in place of the 80,000 merks renounced and the 30,000 merks of debt he undertook. For the Lords thought, that, if Sir John had paid the money, the renunciation could not have been quarrelled on the inhibition, unless the inhibition had been intimated to Sir John, the payer: but, seeing it was only by a transaction, it was quarrellable on the Act of Parliament 1621, as in defraud of the prior creditor's diligence; unless he got an equivalent in its room. For the second transaction was looked upon as a contrivance to put his son in fee of the most part of his land. *Vol. I. Page 609.*

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1694. *February 16.* SHAW of NETHERGRIMMET *against* THOMAS MACKBIRNY, and GRIERSON of DALGONER.

THE Lords found Mackbirny's taking decreets against the tenants, after advocations and tabling the cause before them, and his uplifting the rents, which he alleged could be no riot, being *auctoritate judicis*, was a contempt of their authority; and, therefore, ordained him to restore the rents to the other party, and fined him in £100 Scots to the poor. *Vol. I. Page 609.*