1685. *March.* James Samuel *against* Sir James Rochead.

An assignee to a bond, whose assignation was reduced for not being subscribed by two notaries, having got infeftment out of the debtor's lands, and transferred his right to Sir James Rochead, who compeared after pronouncing of the decreet, and craved to be heard against the probation led for making void the assignation;—the Lords did not admit Sir James Rochead's interest in this state of the process, in respect it was not sooner intimated.

Page 155, No. 559.

1685. *March.* Ross of Tillisnaugh *against* Gardin of Migdstrath.

In the improbation, at the instance of Ross of Tillisnaugh against Gardin of Migdstrath, of a bond of thirlage, upon this direct article, That the defender had sometimes alleged upon a temporary bond, and at other times had shown a perpetual bond, which had been quarrelled by those who saw it, as not bearing the true subscription of the deceased Alexander Ross, the alleged subscriber, and which the defender refuseth now to produce; and the bond produced by him is, by vitiation, made a perpetual of a temporary bond, and was given in so vitiated to the register by him; all which was proven;—the Lords found the bond produced, not only not probative, but also false, in respect of the vitiation *in substantialibus.* But they did not remit Migdstrath to be criminally punished, but left it to the advocate to raise an indictment before the justices, and lead what probation he thought fit: Albeit Migdstrath had abidden by the bond, in respect it was an evident granted to his predecessors, and it was not clearly proven that he had made the vitiations.

Page 155, No. 560.

1685. *March.* Lady Kettleston *against* John Hay.

Mr Thomas Hay having advanced his sister, the Lady Kettleston, £1400, at several times in small sums, who, at the foot of an account thereof, acknowledged the above-written sums were truly delivered to her, but did not oblige herself to repay the same to him; she pursued his heirs, who obtruded the said declaration, and she alleged her brother had her own money in his hand. The Lords found the subscribed acknowledgment did not import an obligation.

Page 224, No. 795.

1685. *March.* Smith of Inveramsay *against* Abercromby.

The Lords rejected an order of redemption; for that the instrument of pre-

monition did not bear the procuratory was shown or offered; the cause being favourable, and it was not alleged that the procuratory was called for.

Page 242, No. 849.

1685. *March.* Lady Anne Gordon *against* The Earl of Aboyn.

The Earl of Aboyn being pursued by Lady Anne Gordon, as representing his father, who was factor for the pursuer, and so liable to do ordinary diligence for uplifting the rents of her locality, which are now become desperate by the poverty of tenants, seeing *mandatarius tenetur ad talem fidem et diligentiam in rebus mandatis qualem præstare solet in suis;*—Answered for the defender, That, by the quality of the factory, he was liable for actual intromissions allenarly, and could not be obliged to intromit; and his service was gratuitous. The Lords sustained the answer for the defender.

Page 258, No. 914.

1685. *March* 12. General Dalziel *against* The Earl of Marr.

In a competition between a prior infeftment of relief, without possession or confirmation, and a posterior public infeftment confirmed,—Alleged for the infeftment of relief, That, seeing the same was not a title of possession till after distress, it must be reputed public *ab initio*, unless, after distress, the party had been *in mora* to possess: just as an infeftment of annualrent would be preferred to a posterior voluntary [right] clothed with possession before the term of payment of the annualrent, seeing the annualrenter could not possess till the term; and the want of possession cannot infer simulation. Answered, The infeftment of relief might have been made public, *ab initio*, by confirmation; and, as a confirmation, prior to another right attaining possession, will make the first preferable right, so an infeftment of relief should be made public by confirmation or declarator. The Lords inclined to prefer the infeftment of relief for the reason above mentioned; but the point was not voted.

In this competition, it was further alleged, That the confirmation of the infeftment of relief was of a date posterior to the other's confirmation; yet that can only be considered from the date of the superior's delivery of it to the party, and not from the date of his subscription, otherwise it might be in the power of superiors to let confirmations ly subscribed several years by them, and prefer creditors as they think fit. Answered, Seeing the superior's confirmation requires not to be published, but may be kept private by the obtainer, and the design thereof is only to have the superior's consent, after the charter is signed and the composition paid, it is looked upon as the party's evident from the date of the subscription; and the priority and preference of confirmations in exchequer is ruled according to the date and sealing, without respect to the delivery. The Lords found the allegeance of not-delivery relevant; and that confirmations granted by private superiors are to be considered from the date of delivery to the party, or some to his behoof, and not from the date of subscribing. Which