

*foro*, where her defence, upon her first husband, John Colvil's anterior right, was competent and omitted; she making faith that it was *noviter veniens ad notitiam*, and did not then consist with her knowledge; and thought her husband's homologation of the second right would not import a renunciation of the first against the wife, who could not be prejudged thereby, (whatever it might have operated against the husband himself.) But the Lords considering, that if the son was not infest upon the first right which was made to him in 1649, that then the father's second right, in 1652, would be preferable, seeing infestment had followed thereon; therefore they ordained the reporter to try that point, if the first right was completed by infestment; as also, to call for the contract of marriage, to see if it proceeded upon the first or second right, or if it was general, without relation to either.

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1698. December 26. LORD MONTGOMERY *against* BLAIR and CARSELANDS.

THE objection was against the pursuer's active title, that the warrant for the seasine was not produced; for the charter given out did not bear the precept engrossed; being before the Act of Parliament 1672, requiring they should be inserted in the charter.

The Lords found it sufficient against thir defenders, who produced no right to the lands; but if they did, it then would be time for them to crave the precept, as the warrant of the seasine to be produced.

Then they ALLEGED, It was not his own, but his grandfather's seasine: but it seems the *jus apparentiæ* is good enough against them, unless they have a right.

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1698. December 27. CAPTAIN CASSIE, Slater, *against* JAMES BAIN, Wright.

THE Lords found the discharge granted by Cassie to Sir William Binny, of the 4000 merks he owed James Bain, was good, and his application of it to the account Bain was then owing him, must subsist; unless he can prove, that the order he gave to Sir William to pay it to Cassie, bore expressly, (whether verbal or in writing,) that he should only pay it in part of the bond bearing annualrent, and not of the subscribed account, which bore none; in which case he could only recur against Sir William, and not against Andrew Cassie: for though, in the case of indefinite payment, the debtor has the application, and it should be ascribed *in duriorem sortem*, to extinguish the debt that is heaviest to the debtor; yet where the creditor has expressly applied it already by his discharge, that must be the rule; and, even in the general, the *durior sors* does not always take place, for it defaults *primo loco* from the annualrents, and only *secundo loco* from the principal sum, though that be unquestionably the *sors durior*. But what seemed severe in this interlocutor was, that James Bain himself was not the payer, nor accepted of the discharge so qualified and applied, (in which case there would have been no doubt but it would have bound him,) but the same is made by a third party by his direction; his fault only was, that his