*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 infeft upon the first right which was made to him in 1649, that then the father's second right, in 1652, would be preferable, seeing infeftment had followed thereon; therefore they ordained the reporter to try that point, if the first right was completed by infeftment; 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. *Vol. I. Page 584.*

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1693. *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. *Vol. I. Page 584.*

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1693. *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 defaulks *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

order was not special, to what sum he would have the payment ascribed. And whereas the subscribed account, by the decreet, was also made to bear annualrent, it was thought James might be reponed against that, because it was only as holding him confessed on a promise of payment of annualrent.

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1693. *November* 17; *and December* 27. DAVID SCOT of SCOTSTARBET *against* GEORGE SCOT of GIBLISTON.

THE reduction and declarator, pursued by David Scot of Scotstarbet, against Mr George Scot of Gibliston, his cousin, was this day debated and advised. Scotstarbet's father had given a bond for 200,000 merks, to Mr George's father, (they being full brothers-german, to exclude any deed of their father's, in providing it to his children of a second marriage,) to be paid by his extraneous heirs; excepting always the heirs-male and of line of his own body, who were noways to be liable in the payment or performance of this. Mr George, on this bond, had served an inhibition: Scotstarbet craved the said inhibition to be reduced, and that the bond laid no obligation on Scotstarbet to fulfil the same, but that he was absolute fiar and proprietor of his estate.

The Lords found, No execution nor diligence could pass on this bond against Scotstarbet; and, therefore, reduced the inhibition as null and informal: but sustained Mr George's defence against the declarator; and found, that Scotstarbet could do no voluntary, gratuitous, or unnecessary deed, to frustrate, evacuate, and elude that bond: for they thought it behoved to operate something; and if it had not at least that effect, it would signify nothing. Four of the Lords thought the bond could never hinder Scotstarbet from disposing of his estate as he pleased, being absolute fiar, and under no irritant clauses; and that the most it could import was a tailyie; but that he could alter, break, and infringe, at his pleasure, there being no prohibitory clause save the obligement to renew it aye and while Mr George's father was secure. There was also a part of the Lords who thought the bond not only obligatory *quoad* the restrictive effect foresaid, but were also for sustaining the inhibition to secure it, at least, against gratuitous alienations; seeing, an inhibition is not so much an execution as a diligence for security. But the plurality carried it *ut supra.*

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*December* 27.—The Lords reädvised that affair decided *supra,* 17th November 1693, between Mr George Scot of Gibliston and Scot of Scotstarbet; and found, that, by gratuitous deeds, they meant only his disponing to extraneous persons, but that it noways hindered him to give his estate to his daughter, or any descendant of his body. Some thought it could not impede him to give it to whom he pleased; seeing this bond was but of the nature of a tailyie, which, being a mere destination, can be broken and inverted at pleasure, unless it contain irritant clauses. But the Lords would not go that length; and only declared it should not bind him up from bestowing it upon any of his own issue, or blood; seeing the bond behoved to operate something. *Vol. I. Page 585.*