

conform to the said decret obtained in the baron court. Alleged, That the decret in the baron court was null, because there was confusion of diets in it ; the day of compearance, litiscontestation, and sentence, being all in one day. The Lords repelled the exception ; for the formalities used in other judicatories are not used in baron courts, where it is proceeded more summarily, specially when the parties are compearing.

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1629. *February 11.* ALEXANDER FRASER, Petitioner.

MARGARET Hay, having led a comprising of certain lands against Alexander Fraser of Philorth ; before her comprising was allowed by the Lords she died ; and her son, Alexander Fraser, being served and retoured heir to her, gave in a supplication to the Lords, desiring that the same comprising, led at his mother's instance, should be allowed in his name, and that he might have a warrant to the director of the chancery to direct out precepts for infesting of him, as if the comprising had been deduced by himself. Some were of opinion that he behoved to transfer the comprising in his own person first ; but, by the most part, the desire of the bill was granted.

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1629. *February 11.* GILBERT WILSON *against* MARGARET STUART.

IN an action pursued by Mr Gilbert Wilson against Margaret Stuart ; Alleged, No process at the pursuer's instance, because he pursued as son and heir served and retoured to his father, and the retour was not produced to verify his interest. Replied, The defender could not be heard, because she had herself obtained decreets against the pursuer as heir to his father, and so had acknowledged him to be heir. Duplied, Albeit she had gotten decreets against him as heir, yet that will not furnish him action against her, because he may be heir *passivè*, and yet not *activè*, as by a service not retoured. The Lords found the exception relevant.

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1629. *February 14.* GRANT *against* INNES of BALVENY.

GRANT having comprised certain lands from N. charged Innes of Balveny, superior thereof, to infest him. He suspended upon this reason, That he from whom he had comprised was not infest. The charger Alleged, That the suspender acknowledged N. to be his vassal, in respect that he had received from him a resignation *ad remanentiam* ; and likewise had taken from him the feuduties of the same lands divers years, and given him discharges thereof. The

Lords found, that, notwithstanding of both these, he behoved to verify; otherwise, that he, from whom the charger had comprised, was infeft; and so found the reason of suspension relevant.

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1629. February 14. ANDREW STEPHENSON *against* WILLIAM PATERSON.

ANDREW Stephenson pursued a transferring of a bond of 1000 merks, against William Paterson, as heir to his father, at least behaving himself as heir by intromission with his heirship-goods and gear. Alleged, Any intromission he had, was by virtue of the Lords' warrant. Replied, That he intromitted with more than was in the inventory made up upon the warrant, *viz.* with a bible, a sword, a musket, a sponge, two pillows, and a table-cloth. Duplied, That ought to be repelled, and no further intromission sustained against him; because, he having purchased a warrant to inventory the whole goods within his father's house, if any thing of mean importance has been omitted by the clerk's negligence, his omission cannot hurt the defender, especially he declaring *se, non eo animo ut pro hærede gereret*, to have intromitted with them: And, if it be proven against him, he is content to make the same forthcoming with the rest contained in the inventory *cum omni causa*. The Lords repelled the allegiance, and sustained the summons and reply to be proven against the defender.

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1629. July. The COUNTESS of DUMFERMLING *against* The EARL of DUMFERMLING, her Son.

THE Earl of Dumfermling being obliged, by contract of marriage, to infeft his Lady, in conjunct-fee with himself, in all lands conquest by him during the marriage: She pursued her son, as heir to his father, to infeft her in the mill and mill-lands of Fyvie, as being conquest in her husband's time from N. Alleged, It could not be reputed conquest, because he offered to prove that N. had no valid feu of the said mill, &c. lawfully confirmed before the act of annexation and erection of Fyvie in the Earl's favours; in respect whereof that N. had no good right to the said mill, but the Earl might have challenged it as his own at any time; and so not conquest. Replied, It behoved to be accounted conquest, because he acquired the same of N. by receiving a resignation *ad perpetuam remanentiam*, and by giving him sums of money therefore. Duplied, The receiving of a resignation, *ad remanentiam*, was not an acknowledgment of N.'s right to be good, and for sums of money given; therefore it was to be accounted for his kindness only, and not for his right, which was null. The Lords found the exception relevant:—1st July 1629.

Afterwards it was replied by the pursuer. That N.'s feu, being granted by the Earl of Dumfermling, then prior of Pluscardy, before the act of annexation, although it was not confirmed before the annexation, yet the infeftment was valid; in so far as, after the erection of the same benefice in the Earl's person, he received the feu-duties of the same mill