

no superior was obliged to change the terms of their infeftments. The Lords found that the superior was not in the fault, and therefore repelled the defence.

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1672. *December 5.* DURIE of DUNTARVIE *against* DRYSDALE.

DRYSDALE, having obtained a decret of the Lords, many years ago, against Duntarvie, upon accounts of furniture,—Duntarvie pursues reduction and improbation thereof, and craves certification against the subscribed accounts, which was the ground of the decret. It was alleged, That parties were not obliged to keep such accounts, after so long time, having obtained decret upon comparance, and production thereof. Whereunto the Lords were inclinable; but it being represented, against the decret itself, that it was most suspect, and not to be found in the register, the Lords granted certification *contra non producta*.

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1672. *December 5.* MR EDWARD WRIGHT *against* LAWRIE.

MR Edward Wright, having employed Lawrie, a messenger, to take Carfirie with caption,—pursues the messenger for payment of his debt, because he had suffered the rebel, whom he had taken, to escape. It was alleged, Absolvitor, Because the pursuer's son, having employed the messenger, promised to go along with him, and assist him in the execution. And, true it is, he deserted him, being on the way with the rebel; and, having none with him but one person, he was not able to carry him to prison; but he went to Humby with him, where the messenger followed him, and there he produced a protection under the king's hand. The Lords found the first member of the allegiance not relevant, unless the rebel had used violence; in which case the messenger ought to have broken his rod, whereby the pursuer might have had the benefit of the deforcement; unless the agreement had been expressly, that, if the employer had deserted the messenger, he should have proceeded no further: but found that member of the protection, under the king's hand, relevant;—reserving to the Lords the consideration of the qualifications of payment of the annualrent therein contained, after production.

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1672. *December 19.* The KING'S ADVOCATE and SIR WILLIAM PURVES *against* LOWES.

SIR William Purves, having taken a gift of the waird and marriage of Lowes, pursues for the avail thereof. The defender alleged Absolvitor; because the ground of this marriage is the defender's father's infeftment upon an apprising; and it is offered to be proven, that the apprising was extinct, and satisfied by in-

tromission before his father's death ; so that he died not vassal to the king. It was answered, *Non relevat*, unless, in the defunct's time, the apprising had been declared extinct, or an order of redemption used ; for, albeit satisfaction of an apprising is receivable, by way of exception, amongst creditors, yet it is not competent against the king or his donatar, unless the apprising had been declared extinct in the defunct's life. The Lords found the defence relevant, that the apprising was extinct by satisfaction with intromission in the defunct's life, seeing thereby the former vassal's right revived, and needed no new infestment.

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1673. *January 8.*

STRILING *against* HAMILTON.

STIRLING of Bankel, having feued the third part of the lands of _____ to the Laird of Keir, who had set the two part of the said lands, in tack, to the Laird of Bardowie's predecessor, for several liferents and nineteen years ; and the lands being possessed by small divisions, some being roods, and the common pasturage being possessed promiscuously :—Bankel, with consent of Keir, the heritor, obtained a decret of the baron court, for altering the former division, and dividing the whole land in two entire tenements, wholly separate, one-third to Bankel, and two-thirds to Keir and Bardowie. Bardowie suspends upon this reason, That, he having a long tack, little inferior to heritage, and that the out-field and infield being divided, the division could not be altered without his consent ; and specially seeing his tack bore the lands as they were then possessed, which is according to the present division. It was answered, That a tack, of whatever endurance, was never found sufficient to hinder heritors to divide their lands as they pleased, especially if the tacksman had no detriment ; and the clause in the tack, “ as they were possessed,” is a common clause of course, expressing the quantity and extent of the lands set, but not the adjacency thereof, and is ordinary in all tacks ; so that, if that could hinder division, scarce any division would proceed ; and this being a common interest for the improvement of land, and for good neighbourhood, and being of advantage to both parties, the wilfulness of a tenant, without any reason, ought not to hinder the same. The Lords repelled the reason, and decerned the division to proceed, providing that either party had as much land in value, jointly, as what they now possess severally ; without limiting the same precisely to a two part and third part, in respect that, there being a division in small parcels before, the advantage that either party had by that division, or the improvement thereof, ought not, by this division, to be lost.

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1673. *January 14.* JAMES SYMONTOUN *against* THOMAS and JOHN BROCKS.

JAMES Symontoun pursues Thomas Brock his apprentice, and John Brock his cautioner upon the indenture, for payment of a merk for each day's absence out of his service. It was alleged for the defender, *1mo.* That the apprentice's