

if he did not prove him paid. Some thought it hard to put one in possession to find caution. But it was better so, than to put the other, (whose right was unquestionably preferable, if not paid,) or to sequestrate the rents by placing a factor.
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1694. *February 1.* THOMAS ROME *against* JOHN IRVINE.

PHILIPHAUGH reported Mr Thomas Rome of Clouden, against John Irvine ; where the like allegiance [as in the preceding case, *Johnston against Hamilton,*] being proponed, that he had possessed Netherwood's lands for many years, and so was paid, and craved a count and reckoning ; the other was content to find the allegiance relevant, and to give him a term, and incident diligence to prove it ; but shunned to enter into a tedious count.

The Lords, finding that it could not be otherwise expedite, appointed a count and reckoning.
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1694. *February 1.* FOTHERINGHAM of POURY *against* ALEXANDER RAIT.

PHILIPHAUGH reported Fotheringham of Poury against Alexander Rait's *cessio bonorum*. The Lords sustained this defence to stop his liberation, That the jailer's testificate did not bear the time of his continuance in person ; because they had a sham trick of getting such declarations on their coming into the tolbooth for a little time ; and found it also relevant that he possessed some part of the brewery, &c. but thought it not sufficient that he carried money with him ; seeing he must live, and this *beneficium cessionis* is *ex humanitate et miseratione*.
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1694. *February 1.* JOHN PATON *against* ARCHIBALD NISBET of CARFIN.

ARBUCHEL reported John Paton against Mr Archibald Nisbet of Carfin. The Lords found Paton's right preferable to Nisbet's, over the whole three rouns ; but in regard of the reservation in the former decret, bearing that he should only have recourse to the Hillside, if he fell short of his annualrents out of the other two, they restricted him ; he always getting his full annualrent out of these two rouns, free of all burdens whatsoever ; and this notwithstanding of the declaring of the back-tack ; but prejudice to him to reduce that reservation in the foresaid decret.
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1694. *February 2.* CAPTAIN DONALDSON *against* JAMES CUNNINGHAM.

ARNISTON reported Captain Donaldson against James Cunningham. The question was, Whether the defender was bound to produce the disposition of

some moveables, made to him by his father, mentioned in his oath ; for, being pursued on the passive titles, referred to his oath, he had deponed, he meddled with none of his father's goods, save some contained in a disposition made to him in his father's lifetime, and which he had also then disposed upon, and which disposition bore no burden of his debts.

The Lords found, seeing they had examined him upon all, and that he confessed no intromission subsequent to his father's death, they would not now oblige him to produce the said disposition ; though, in the process before the Sheriff, they had, by their interlocutor, appointed him to do it.

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1694. *February 2.* ROSS of AUCHLOSSAN *against* The MARQUIS of DOUGLASS.

PHILIPHAUGH reported Ross of Auchlossan against the Marquis of Douglass, who was decerned to pay a sum contained in a bond due to Captain Ross, whereto Auchlossan had now right. The Marquis SUSPENDS, on this reason,—That he had raised improbation of the bond, the ground of the decret.

The Lords would not stop the charger's execution, but reserved the Marquis's improbation, as accords.

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1694. *February 2.* JAMES CLELAND *against* JAMES M'CULLOCH of PILTON.

HALCRAIG reported James Cleland, merchant in Edinburgh, against Mr James M'Culloch of Pilton. The Lords found Cleland's insisting on Mr James's promise of payment, did not hinder but that, in another process, he might pursue a cognition of the debt ; these being *diversa media*, and the passing from the one did not cut him out of the other.

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1694. *February 2.* THOMAS CRAIGHEAD *against* MARGARET CUNNINGHAM.

HALCRAIG reported Mr Thomas Craighead against Margaret Cunningham. By contract of marriage, she obliged herself to give him double of what she should bestow on any other of her nephews or nieces. And, for proving she had given a nephew 3000 merks, he produced a letter under her hand ; and from thence concluded, that she might be decerned to pay him 6000 merks.

ALLEGED.—The letter was not probative, and was elicited from her by this very pursuer, to trepan her, &c.

The Lords considered, that, among merchants, missives made great faith ; but, in regard of the circumstances here, they would not sustain it *per se* probative ; but allowed the pursuer, before answer, to adminiculate it, by proving the verity of the matter of fact averred in the letter, and the defender to prove the manner how it was procured from her, and what she designed by it.

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