The Lords repelled the reasons, refused the bill, and sustained the Admiral's decreet of modification; for it was not proven that the ship was damnified by the weight of the lead ore, seeing it might arise from stress of weather, the striking on the anchor of other ships, or from inward latent defects.

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1710. *January* 17. MARJORY MONCRIEF, Lady Denmiln, Petitioner.

MARJORY Moncrief, Lady Denmiln, gave in a bill to the Lords, bearing, that Michael Balfour, her husband, went from his own house in March last, 1709, to visit some friends and for other business; and, in his return home, he sent his servant an errand into the town of Coupar, and told him he would be at home before him; and yet he has never yet returned to his house, notwithstanding all the search and inquiry made for him and the horse he rode on, and no account can hitherto be got what is become of him; by which misfortune his creditors are falling upon his estate, and proceeding to diligence, which may encumber and embarrass his fortune, though it far exceed his debts, unless prevented: therefore craves, in this extraordinary case, the Lords may name a factor to uplift the rents, and out of it pay the current annualrents, and give an aliment to her and her seven children.

There were many conjectures about him; for some have been known to retire and go abroad upon melancholy and discontent; others have been said to have been transported and carried away by spirits; a third sort have given out they were lost, to cause their creditors compound; as the old Lord Belhaven was said to be drowned in Solway sands, and so of Kirkton, yet both of them afterwards appeared. The most probable opinion was, that Denmiln and his horse had fallen, under night, into some deep coal pit, though those were also searched which lay in his way home.

The Lords thought that the case craved some pity and compassion, and that their interposing would come better if the creditors had applied; yet they appointed a factor, to last only for the year 1710, to uplift and manage the rents for the creditors and relict, before which were expired they would be at more certainty whether he be dead or alive. *Vol. II. Page 554.*

1710. *January* 19. SIR PATRICK HOME of RENTON *against* The TENANTS of HEADCHESTER.

SIR Patrick Home of Renton, Advocate, having a roum called Forresterlands, lying within the barony of Old Cambus, belonging to Sir James Hall; and his tenants claiming right to a cart-road through Sir James's ground, to bring home their peats, feal, and divot, out of the muir of Coldingham; and the tenants of Headchester stopping their passage that way, and putting them to go another way far about, Mr John Home, the said Sir Patrick's eldest son, came, in November 1708, with some servants waiting on him, to force their carts' pas-

sage, and defend their possession that way; on which a great fray, convocation, and tumult arose, wherein a poor smith was trode to death, and sundry others hurt: whereupon the Justices of Peace for the shire of Berwick having met, and taken probation of the riot, and advised the depositions of the witnesses adduced *hinc inde*, they found the said Mr Home guilty of the riot; and, as he who *causam dedit* thereto, fined him in £50 sterling. Of this sentence he raised suspension and reduction, on thir reasons, 1*mo*, That the Justices proceeded most partially and unjustly; in so far as he gave in a declinator against the Earl of Marchmont, Sir Andrew Home, and Sir John Pringle, as within the defendant degrees of affinity with Sir James Hall, and yet they sat and voted.

ANSWERED,—Any relation that was betwixt them was dissolved by Sir James's lady, daughter to my Lord Marchmont, her death; 2*do*, Sir James was not the party-complainer, but the constables.

The *second* reason of suspension was,—That four Justices of Peace had taken a precognition of the scuffle, and found that Sir Patrick's tenants had been in use of driving their carts that way.

ANSWERED,—This was but a packed meeting convened by Sir Patrick; and the quarter-sessions of the Justices, having reviewed the case, found it clearly proven that these tenants never had a passage that way, but merely by tolerance, and when the corns were off the ground; and even then they used to give a quart of ale for a license to pass that nearer way, and not be sent about the remoter cart-road.

3*tio*, ALLEGED,—That he had proven possession of going that way; and, *esto* it had been by tolerance and connivance, yet he could not be summarily stopt and dispossessed; and, being opposed *manu forti*, it was lawful *vim vi repellere*. And he did not offer to draw his sword till his horse was beat in the face with a great rung: and however one enters into possession, though cast in with a sling-stone, yet he must be turned out by order of law. And *l.* 3 *D. de Vi et Armata*, tells us, that *arma et tela non solum sunt gladii et hastæ*, but likewise *fustes et lapides*.

ANSWERED,—They oppone the testimonies of the witnesses; by which it is evident Mr Home was the aggressor, and, in the wrong, in claiming a servitude he had no right to; and if he had any pretence, he should have used a civil interruption, and applied to the magistrates, and not in such a barbarous riotous way *jus sibi dicere*; for if in any case, then here, that rule of law took hold, *l.* 176 *D. de Reg. Jur.—Non est singulis concedendum quod per magistratum publice fieri potest;* and servitudes of a *via, actus, et iter*, being only *quasi possessiones, et in dominio et fundo alieno*, are not to be vindicated by force and violence: so he was certainly *versans in actu illicito*. 4*to*, Mr Home alleged,—That, by the 34th Act 1535, where any debate arises as to right and possession, the same must be first cognosced by the Lords of Session, before the riot can be decided, and so the Justices have precipitated their sentence.

ANSWERED,—That they had neither meddled with the right nor possession, but reserved these points to the Lords. All they judged was allenarly the riot; and which deserved a deeper censure than they had inflicted, a poor man having lost his life in the cause.

The Lords having read the depositions of the witnesses, they found the riot and aggression proven; and therefore repelled Mr Home's reasons of nullity against the decreet. But it being moved, that the fine seemed too exorbitant and

excessive, seeing £50 Scots was the ordinary fine in riots pursued before the sheriff, it was alleged that circumstances might aggravate the crime and justify a much larger fine; and that they could not be modified, seeing they must be given up to the Exchequer.

But it was ANSWERED,—That held only after they were exacted, levied, and paid.

The Lords, by plurality, restricted the fine as too high; and then a second vote being put, whether it should be £25 or £30 sterling? it carried £30 by my Lord President's casting vote. *Vol. II. Page 556.*

1710. *January* 20. CATHARINE GRAHAM *against* The EARL of LEVEN and MAJOR COLT.

CATHARINE Graham, relict of John Murray, sergeant in the castle of Edinburgh, as executrix to her husband, pursues the Earl of Leven as governor, and Major Colt as paymaster of the said garrison, for £38 sterling of arrears, when he served there; and, after some debate, she obtains a decreet: which being suspended, the Earl insisted on thir reasons:—That the decreet was null, being pronounced the last day of the Session, and extracted in the vacance, when the Earl had no access to apply. *2do*, She had no sufficient active title in her person, being only a decreet dative and a license, *excludendo sententiam;* and though she now produces a confirmed testament, yet, that being confirmed after she had extracted her decreet, that superveniency can never validate nor supply the defect, seeing the confirmation should be before extract. *3tio*, He produces a discharge under the husband's hand for a part of the claim; and, as to the remains, he must have deduction and allowance of sixpence off his eighteen pence, which is a sergeant's pay, each day, for clothing-money, and a penny the pound for poundage-money, and one per cent. of invalid-money; all which being allowed, he is willing to pay the superplus.

ANSWERED to the *first*,—That decreets pronounced the last day of the Session are as good as those pronounced any other day, else the lieges would be very insecure. To the *second*, Her active title is good enough, seeing she produces a confirmed testament, whether it was produced before extract or not. As to the *third*, anent the discharge, it was competent and omitted, and was kept up on design to procure a new suspension; and she repeated a reduction of it *ex capite metus*, as extorted from her husband *vi majore*,—he being thrust into the pit of the castle till he gave it. To the *fourth*, No deduction for clothing, except for those years they got clothes, seeing he was put to buy to himself; *2do*, Fourpence is all that uses to be defalked off a sergeant's pay; and, for the poundage and invalid-money, she is content to allow them.

REPLIED,—Though decreets in the end of the Session are valid, yet, where parties are surprised, and left without remedy, they may the more easily be reponed; and her active title is nowise sufficient, unless it had been produced to the clerk before extracting: And, for the discharge, competent and omitted can never be obtruded against it; for *bona fides non patitur bis idem exigi*, and *exceptio doli mali* will for ever exclude a party from seeking payment of that which