

The Lords recommend to the Chancellor, High Treasurer, and some others, to endeavour the settling between the two brethren. *Vol. I. Page 284.*

1684. *March 21.* ANDREW DICK *against* CRAIGIE of GAIRSEY.

IN Captain Andrew Dick's action against Craigie of Gairsey in Orkney;—the Lords, on HARCUS's report, found the discharge produced by Gairsey, though it only mentioned for rests of some of his lands, and not of the whole, imported a full exoneration of all his feu-duties preceding 1655, for his scait and udal lands. *Vol. I. Page 284.*

I find much of their feu-duties consists in meal and butter: but the steward, or his chamberlain at his girnell, converts them into a price in money.

1684. *March 21.* JOHN IRVINE *against* BROWN of CARSLUITH.

HARCUS reported the debate between John Irvine in Dumfries, and Brown of Carsluith;—and the Lords found a back-bond granted by Maxwell of Coull, Irvine's cedent, not being precisely correlative nor relative to the bond charged on, though of one date, did not meet Irvine, who was an assignee, unless it were without an onerous cause, or for the cedent's behoof, or that the back-bond founded on had expressly related to the bond charged on, and the one had been made the cause of the other; which was *Hector Mackenzy's* case in 1676, and *Arthur Forbes's with the Master of Salton*, in November 1673.

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1684. *March 25.* LORD MORDINGTON'S CREDITORS.

By an order of the Lords to HARCUS, the lands of Nether-Mordington, belonging to Douglas, Lord Mordington, are roup'd, on the late Act of Parliament 1681, anent the sale of bankrupts' lands, upon citation of the creditors; and Lieutenant Joseph Douglas buys them at 17 years' purchase, and seeks no other warrandice from the creditors but efferand to the sum they get from him. Provost Curry, a creditor, opposed this all he could; but Charles Oliphant, the under-clerk, another creditor, carried it on. *Vide supra*, the roups of *Bogie and Cunnochie*, by order of the Lords of Session, though before that Act of Parliament. *Vol. I. Page 285.*

1684. The EARL of ABERDEEN, Chancellor, *against* SIR ALEXANDER FORBES.

February 27.—THE Earl of Aberdeen, Chancellor, and Sir Alexander Forbes of Tolquhon their case was decided, anent *viæ regię, vicinales, publicę, et privatę*.

The Lords having heard the bill and answers, they sustain Tolquhon the defender's allegiance in these terms, that the defender offers to prove, the way controverted is the high-way directly leading from a burgh-royal, *viz.* Banff, to a burgh-royal, *viz.* to Aberdeen, or from Banff to a sea-port directly, and so is the king's high-way: and adhere to the Act as to the other points, allowing to prove that he had prescribed a way for peats, by forty years' possession before interruption; and refused to grant a commission or visitation; but prorogate the diet of reporting the diligence to the 25th March next.

For high-ways consider the 53d Act Parl. 1555; 156th Act 1592; 38th Act 1661, article, *Of the High Ways*; and 16th Act 1669; Mascard. *de Probat. voce, Via*; Bart. Cæpolla, *de Servitut. tractat.*², *cap.* 3; and Stair's Institut. tit. 17, *Of Servitudes*.

It was ALLEGED for the Chancellor,—In thir cases there was only *tantum præscriptum quantum possessum*, and no more; so that his use and custom of carrying lime that way ought not to give him right to carry peats, (unless he had carried also peats that road forty years,) these being *diversa*; and it being odious to burden another man's lands with servitudes of high-ways; yet the carrying the one is no more prejudicial than the other. See Craig, *feud. lib.* 1. *dieges. ult. de Regalibus*. And, by this interlocutor, no way ought to be reputed a king's high-way, unless both the *terminus a quo et ad quem* be public; whereas lawyers think it enough though it begin *in agro privato, si exitum habet ad viam publicam, vel urbem, vel portum, vel flumen navigabile*, or to a kirk, or to a moss. The Chancellor would make Tolquhon to have right only to a foot-way, or an *actus* at most, for a horseman, but not to be a *via* for carts or wains, or droves of cattle. *Vide* 26th March 1684. *Vol. I. Page 274.*

March 26.—The Chancellor's action against Sir Alexander Forbes, mentioned 27th February 1684, is called; and though Tolquhon had a diligence running, and the circumduction for not producing it was only conditional till the 22d of March, before which he produced it, and craved a second diligence; yet the Lords rejected it, and advised the probation led by the Chancellor; and declared his lands free (*nam unumquodque prædium præsumitur liberum nisi servitus probatur,*) of any high-ways for leading of peats; and found Tolquhon had not proven his right of servitude; and therefore assoilyied my Lord Chancellor and his lands. *Vol. I. Page 285.*

1684. March 27. The EARL of WINTON against PATRICK CUNNINGHAM.

THE Earl of Winton gave in a bill, craving Mr Patrick Cunningham, agent, might be examined on the declarator of trust of a tack of prorogation of George Young's teinds in Winchburgh, in respect he was on death-bed.

The Lords recommended to my Lord Edmonston to go to his house, and take this oath; but he died before his examination.

Winton, by another bill, craved one Robert Seton, in Tranent, to be examined upon the tenor of a lost bond, whereon there was an action depending, to the effect it might lie *in retentis, ad futuram rei memoriam*.