reason; especially seeing there were three or four other witnesses who concurred with them in the same things, and against whom there was no such objection. So, on the whole matter, the Lords adhered to the decreet, and refused to loose it. *Vol. I. Page* 626.

1694. *July* 4. The Two Daughters of Crookston *against* John Borthwick, their Brother.

The cause of the two daughters of Crookston, against John Borthwick, their brother, for payment of 12,000 merks, contained in their mother's contract of marriage, was reported. Alleged,—All these provisions to daughters of a marriage are only in case there be no sons, and the estate tailyied to an extraneous heir; so that the daughters, as heirs of line, are debarred; then portions are especially provided to them; but *ita est* there is an heir-male of the marriage here, and the clause is conceived by mere mistake; for never was it dreamed that daughters should have 12,000 merks off their own brother, by a contract, unless there were a bond of provision. Answered,—The clause is most express; and, whatever is the usual style, yet paction may derogate therefrom; *et in claris non est locus conjecturis:* and, in regard of this provision, the father had disponed all his moveable estate by his daughters; so, if they got not this, they would he absolutely frustrated, and get nothing. The Lords found the clause so express that they decerned conform; though it was both unusual and exorbitant, yet it was not unlawful. *Vol. I. Page* 626.

1694. *June* 22 *&* 29; *and July* 4. The Earl of Tweeddale, Chancellor, *against* The Earl of Lauderdale.

June 22.—Whitelaw reported the reduction, raised by the Earl of Tweeddale, Chancellor, against Richard Earl of Lauderdale, of a decreet obtained by the Duke of Lauderdale against him for the teinds of Pinkie. See Stair, *22d January* 1678. His reason of reduction was, That he succumbed then; because, having founded upon two tacks of these teinds, the one from Abbot Pitcairn to M'Gill of Rankieler, the second from Queen Anne;—the Lords had repelled both the defences founded upon these rights:—the *first*, Because, though Rankeiler's tack was produced, yet his assignation of the same to the Earl of Dumfermline, Tweeddale's author, was not produced; and so it was *super jure tertii:* and the *second*, Because Queen Anne, being but a liferentrix, her tack had ceased with herself. And now, as the Earl of Tweeddale had recovered Rankieler's assignation to Dumfermline of that tack, and producing it, he ought to be reponed,—it being but of the nature of a certification in a single reduction, which is always taken away by production; especially seeing he was ready to give his oath that he had it not then, but has recovered it since out of Dumfermline's charter-chest. Answered,—The decreet *in foro* cannot be opened, that being no nullity; and it was the Earl of Tweeddale's own fault that he did not seek an incident diligence for recovery of the assignation as well as the tack; seeing they

were both in the charter-chest; and so it is not *noviter veniens ad notitiam*, but only *instrumentum noviter repertum:* and the law says, *ob instrumentum noviter repertum non retractantur sententiæ.* And the want of the assignation was not the only motive of the decreet, but also the incompatibility of the two tacks; which, being to sundry persons, and to different endurance, the Lords found the acceptance and using of Queen Anne's (which was the last, and mentioning the other,) was an absorbing of his option and faculty; and he could not recur back to the first. The Lords, thinking this a point of importance, ordained it to be heard in presence. *Vol. I. Page* 621.

June 29.—The Earl of Tweeddale's reduction against the Earl of Lauderdale, mentioned 22d current, being heard in presence, was this day advised; and the question was, If my Lord Chancellor could be now reponed to produce the assignation, not having done it in the first decreet; for the Lords made a great difference between an emergent defence, not existing at the time of the first sentence, or existing, but not consisting with the parties' knowledge then, and the production of a writ which was then in being, and in his knowledge, but was not in his hands, nor any diligence required for recovery thereof. The *first* was *exceptio emergens;* the *second, noviter veniens ad notitiam;* and the *third, instrumentum noviter repertum.* As to the *first*, there was no doubt of its being receivable;—the *second* was a favourable case, if, by his oath and other documents, he instructed his ignorance of it at the time;—but the lawyers are plain in the *third*, which seems to be the present case, that *sub prætextu instrumentorum noviter repertorum non retractantur sententiæ;* that the Lords' decreet did not singly go on that ground of the not production of the assignation; but *esto* it had been *in campo*, they thought it null:—1*mo*. Because the tack set to M'Gill of Rankeiler, being personal to himself and his heirs, it was intransmissible to assignees; for, though the law favours creditors, and has introduced that they may be carried by a judicial and legal adjudication, yet it has never yet gone the length to sustain voluntary assignations in that case. 2*do*. The Lords, at pronouncing of that decreet, had also the incompatibility of the two tacks under their consideration; and on all these grounds declared Lauderdale's right. On the other hand, it was urged for Tweeddale, that the process was originally a spuilyie, which is a possessory action, and cannot debar any new production to be made; whereas, had it been on the declarator, it would have been *res judicata:* and so there was no access, in such a petitory action, to lay open the decreet. At last it came to a vote,—Repone Tweeddale against the decreet, and receive his assignation to the tack, as if it had been produced *ab initio;* so as he may be heard upon the material justice of the decreet, and grounds whereupon it proceeded. And Repone carried, seven against five. *Vol. I. Page* 623.

July 4.—The Lords again advised the Chancellor's cause against Lauderdale, upon a bill given in by Lauderdale, reclaiming against the interlocutor 29th June 1694, and a new debate thereupon; and the Lords now found, That the decreet was not only founded on the not-production of the assignation to Rankeiler's tack, but also on the incompatibility of the two tacks, the one from the Abbot and the other from Queen Anne. And found, though the words of the interlocutor run more against Queen Anne's tack, as inconsistent and incompatible with that of Rankeiler's, and so that it was extinct; yet they found, by

the whole debate in the decreet before the interlocutor, that it behoved to be the Lords' sense and meaning that Rankeiler's tack was extinct and passed from by Dumfermline's accepting a posterior tack from Queen Anne; seeing *posteriora derogant prioribus*, and that the law notion of incompatibility is, that they cannot both subsist, but the last is interpreted to be a renouncing, quitting, and passing from the first: though, if one look here to the *cortex verborum* of the interlocutor, it favours the Chancellor, as if Queen Anne's tack had been found null, as inconsistent with Rankeiler's tack: which the Lords could not judge on, seeing Rankeiler's heirs were not called. This alteration fell by some of the Lords changing their votes, and by two declaring themselves *non liquet*; so, as before it was seven against five, it was now six and six; and the President's vote in favours of Lauderdale did cast the balance. Sentences of judges deserve the same allowance that other acts have by law, *viz.* that such an interpretation is to be laid hold on as will make it consistent with itself, and evite absurdity, and cause it subsist and not fall as null. *Vol. I. Page* 626.

1694. *July* 5. JAMES NAYSMITH *against* The TENANTS of WHITSLAID and WILLIAM MONTGOMERY.

JAMES Naysmith, pursuing the Tenants of Whitslaid, and William Montgomery, on a general service, as heir to his mother;—it was OBJECTED,—That it was not a sufficient active title to carry the right of the adjudication, because there was infeftment passed thereupon. ANSWERED,—He passed from the infeftment; and, in that case, there was no doubt but the general service was sufficient. The Lords found he could not divide them, seeing there was infeftment actually taken; and which could not be conveyed but by a special service. *Vol. I. Page* 626.

1694. *July* 5. THOMAS YOUNG and JOHN THOMSON *against* DONALDSON, GAIRNS, and GUTHRY.

THERE was no doubt but the certification in a single reduction was taken off by production of the writ then called for, on paying the expenses; but the difficulty was, By your not producing it then, you defrauded me of this reply, *viz.* that you was satisfied and paid by your intromission; and which I would have proven by Helen Thomas her oath; and which I now lose by her death. The Lords reponed them, finding the mean of probation was not perished; seeing they might still prove her intromissions either *scripto*, by her discharges, or even by witnesses, that she possessed and intromitted. *Vol. I. Page* 627.

1694. *July* 5. MR JAMES DEAS, Advocate, *against* JAMES HAY, Writer to the Signet.

THE Lords found, As to the 500 merks of fine that he paid, there could be no