1695. *February* 5. Mr John Lauder *against* Douglass and Others.

Crocerig reported Mr John Lauder, minister at Eccles, against Douglass, chamberlain to the Earl of Roxburgh, and other heritors of Lilliesleaf, for the stipend thereof *anno* 1690, he having preached there as Presbyterian minister, upon the call and invitation of sundry in the parish. Douglass, as having a gift from the Earl of Roxburgh, patron, applied it to the buying of communion-cups, and other pious uses, in the terms of the Act of Parliament. The question was, If it was truly a vacant stipend: For, if it was, the patron might freely dispose upon it; but, if it was not, then the doubt occurred, Whether the minister behoved to prove, that he had the call and concurrence of the plurality of the masters and heads of families in the parish; as was done in the case of Borthwick, Hamilton, &c.

But the Lords considering that he had the attestation of the presbytery anent his service there, this was judged sufficient probation, without farther instruction. What further moved the Lords to prefer the minister was, this church continued vacant a year or two after the year acclaimed, so they had these vacant stipends to defray their expense in buying the communion-cups, &c. *Vol. I. Page* 666.

1695. *February* 6. The Creditors of Hay of Monkton *against* The Lady.

Phesdo reported the competition between the creditors of Hay of Monkton and the Lady. They first craved preference for the debts contained in her husband's disposition, with which he was burdened, and must be an *onus reale*, and preferable to her. Answered,—She was not concerned therein, as they were neither mentioned in the procuratory of resignation, precept of seasine, nor infeftment; and, whatever buyers may do, yet wives and their friends go no farther back than the husband's seasine; and this being since the Act of Parliament 1685, anent inserting all these clauses in tailyies, and being omitted, the general clause relative to the provisions, "within written," cannot militate against her. *2do.* They founded on their gift of recognition, and which they declared they only made use of to secure the 6000 merks paid for it.

The Lords, thinking the points of general importance, named some of their number to endeavour to settle the parties. *Vol. I. Page* 666.

1694 *and* 1695. Gordon of Daach *against* Gordon of Techmuiry.

[See the prior parts of this Case, *supra*, pages 51 and 77.]

1694. *January* 18.—Mersington reported Gordon of Techmuiry against Gordon of Daach. The Lords adhered to their former interlocutor, and preferred the children of the first marriage to the son of the second: for, though a clause of conquest, in a contract of marriage, does not impede a father's domi-

nion to dispose on it, either to strangers, or, in a second contract, to a second wife and children, yet these provisions must be rational and moderate; and, therefore, seeing the specific obligements of the second contract were more than doubled, they found the father's disposition of thir lands to his daughters of the first marriage, was preferable to the clause in the second contract, burdening the lands of Enchries, and none other, with that 6000 merks. *Vol. I. Page 592.*

February 23.—Mersington reported Gordon of Daach against Gordon of Techmurie. The Lords so far rectified their former interlocutor, 18*th January* last, that they found the specific sums, contained in the two respective contracts of marriage, were to be made up and fulfilled out of the several conquests of these two marriages *primo loco;* but, if the conquest of the first marriage was not able to implement the contract's special obligements, then the children of the first marriage might have access to affect the conquest during the standing of the second marriage, *et e contra.* *Vol. I. Page 615.*

1695. *February* 8.—Mersington reported Gordon of Daach against Gordon of Techmury, mentioned 18th January 1694. The Lords had first found the heir of the second marriage liable *in quantum erat lucratus;* and thereafter, that the conquest made during the first marriage behoved to go first towards implement and satisfaction of the obligements conceived in favours of the bairns of the first marriage; and, until that were exhausted, they could not recur to affect the conquest during the standing of the second marriage. Daach now insisted against the heir of the second marriage *super eo medio nuper perveniente,* that he had served himself heir.

Replied,—That the bonds he was pursued on were granted *in lecto,* and so could not reach him, the heir. This deathbed appearing only to be an infirmity in the granter's back, and rather *vitium* than *morbus sonticus,* and that he was ten years under it, and the bonds were three years before his death; they doubted much of such a deathbed, but allowed a probation anent his state and condition at that time, with this declaration, that, if Techmury, the heir, succumbed, they would burden him with large expenses. *Vol. I. Page 667.*

[See the remaining part of this Case, 11th June 1697, Dictionary, page 3299.]

1695. *February* 8. Monteith of Milhall *against* Sir Alexander Hope of Carse.

Philiphaugh reported the mutual declarators between Monteith of Milhall and Sir Alexander Hope of Carse, anent a burial-place in the church of Falkirk, which of old belonged to the Monteiths of Milhall, and was claimed by Milhall, as a cadet of the family of Carse; and who also offered to prove immemorial possession.

But the Lords preferred Carse, in respect it was *specifice* contained in his infeftments; and, though burial-places were *inter res religiosas,* yet, with us, they were *in commercio,* and ordinarily transmitted by dispositions, with charter and seasine following thereon. And what particularly moved the Lords here, was, that Milhall and his predecessors had, by letters, sought tolerance to bury there, and so their possession had no title, but was merely precarious.

Vol. I. Page 667.