

1672. February 6. MR JAMES LOWES *against* SIR ANDREW DICK.

IN an action for maills and duties of the lands of Craighouse, wherein the said Mr James Lowes was infeft as heir to his father, who had a wadset of the said lands, affected with a back-tack, against Sir Andrew Dick, who was heritor and in possession; compearance was made for Sir John Lesly, as donatar to the life-rent escheat of Sir Andrew;—and thereupon ALLEGED, That he had been seven years in possession, and ought to have the benefit of a possessory judgment until his right was reduced.

It was REPLIED, That the pursuer, during some of these years, had gotten payment of his back-tack duty; and, albeit it was by interposed persons, to whom he gave assignations, yet he offered to prove that it was by Sir Andrew's means, and to his behoof, who was heritor.

The Lords did sustain the reply, and found payment so made was equivalent as if it had been done by Sir Andrew himself.

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1672. February 16. The EARL of NITHSDALE *against* The TENANTS of DUNCAN.

IN a removing, at the Earl's instance, against the tenants, it was ALLEGED, That the Earl, by himself or his servants, at his direction, had invaded five of the defenders, who were commissioned by the rest to execute a summons of imprisonment, raised at their instance against the said Earl; and therefore, by an Act of the 8th Parliament, and by another of the 14th Parliament of King James VI. ratifying the same, making it a perpetual law, whereas the first was temporary, the Earl did lose all the interest that he had in these lands, and the defenders were secured from all real action at his instance hereafter.

It was REPLIED, That the defence was only competent to those who were actually invaded; and, even as to those, order and direction is not relevant by the Act of Parliament, and, if it were, it is not probable but *scripto vel juramento*.

It was DUPLIED, That the Act of Parliament, bearing all invaders, art and part, or who gives red and counsel to be liable, it is sufficient to allege that the Earl gave order and direction, or that *ratum habuit*, by imprisoning one of those who were wounded; and the Act of Parliament ordaining, that such a crime should be summarily tried before the justice or other judges competent, where order and direction is probable by witness, that same manner of probation ought to be sustained here, otherwise the Act of Parliament might be elided; seeing it cannot be supposed that the giver of such an order would put it in writ, to be a ground of a dittay against himself; and the penalty being no less than the forfeiture of interest, it ought not to be referred to his own oath, who is committer of the crime.

The Lords did sustain the action, being founded upon order and direction; but, as to the manner of probation, they assigned a term to both parties before answer, for leading of witnesses, and to the defender for proving the direction and rathabition, and to the pursuer for proving that he was absent the time

of the invasion, and that the assaulting was upon a sudden occasion and misdemeanour, so that he could not be thought accessory thereto; and for the ratihibition by imprisonment, that it was only until he should keep a regality court, like as the first lawful day he did liberate the person wounded, and gave sentence against the defender.

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1672. February 20. GEORGE SHAW of SAUCHIE *against* The LAIRD of CLACKMANNAN.

GEORGE Shaw, apparent heir of Sauchie, having pursued the Laird of Clackmannan for an annualrent of 3000 merks yearly, since the date of a missive letter, written by Clackmannan *in anno* —; as likewise for granting him a reversion of his land estate, worth 40 chalders of victual, and of his coal rent, worth £10,000 yearly, upon this ground,—That Clackmannan, and other friends, in the foresaid missive letter, had declared that they were willing to infest the pursuer and his wife in the said annuity, and that his estate was worth so much of yearly rent;—it was ALLEGED for the defender, That the letter was not obligatory, because it was only written, at the pursuer's desire, to Mr Mungo Murray, minister in England, of purpose to induce him to give a good portion with his only daughter, whom the pursuer had married; and the letter was qualified with a provision, in case he should give a suitable meeting, considering his interest in the parties. But so it is, That he was so far from giving any meeting, that he did disinherit his daughter, and disposed all his estate, which before he had provided to her, in favours of Auchtertyre.

It was REPLIED, That the said missive letter, as to any provision of his wife, being qualified, as said is, albeit it was not obligatory in her favours, yet, as to the pursuer's interest, which was distinct,—*viz.* that he might have an annuity of 3000 merks until count and reckoning was made; as likewise a reversion, bearing, that the defender being satisfied of his debts and engagements, if his intromission with an estate of the foresaid value did not amount thereto; and that being satisfied, he should dispose an estate worth 40 chalders of victual, and £10,000 of yearly rent,—the letter was obligatory.

The Lords did find, That, the letter being written by the pursuer's friends, not to himself, but to his father-in-law, to induce him to do a favour to the pursuer, and that upon a special provision, which never took effect, it was not at all obligatory as to any thing therein contained against Clackmannan; but reserved to the pursuer to call Clackmannan to account for his intromission, according to the true rent of the estate, that, being satisfied of his engagements, he might dispose the same.

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1672. February 23. MR STREET, Merchant in London, and JACKSON, *against* JAMES MASSON.

IN a reduction and declarator, at the instance of the said Mr Street and