

act and commission to Patrick Brown of Colstoun, Sheriff-depute of East Lothian, to pass to the places where the bear lies, and there, with the advice of skilled maltmen whom he shall call to him, visit and take inspection of it, if it be rotten or spilt, and report betwixt and the 17th of July. Accordingly, he having visited, returned his report that it was good and sufficient as any bear of the year 1675 could be. *Vide supra, James Hamilton and Earl of Roxburgh, No. 598, [July 10. 1677.]* When the Lords came to advise the report, all they had to say against it was, that the Sheriff had not visited within the days limited to him by the commission: which the Lords repelled in respect of two answers. *1mo*, That the Sheriff-depute could not possibly attend these days; because, his master and constituent, the Duke of Lauderdale, being then entering Scotland, he was waiting on him. *2do*, The defender had no prejudice, for he compeared at the visitation, though he protested against the Sheriff's procedure, in regard the days prefixed were expired, and it bore not with continuation of days. The Lords found the report proved not the reason of suspension, and therefore, *pro secundo*, found the letters orderly proceeded.

Their last refuge was to offer to prove, by John Smith's oath, *1mo*, That the victual offered was spilt with the sea water. *2do*, That it was not of the growth of Waughton. *3tio*, That it was not of the crop 1675. All which John Smith having denied; at last we got our decret extracted.

It was thought a point of favour to sustain the commission executed after the day, for Gosfuird had one casten on that single head.

On the 27th of July, at Exchequer, Auchinleck obtains the gift of his own escheat, upon the horning of one Cathcart against him for L.12 Scots; though the act of the Parliament 1592 seems to declare such gifts taken by the rebel null; yet here, creditors were not prejudged, for it accresced to them; and this was the first reason that moved the Lords of Exchequer to pass it. The second was, that the execution of the denunciation was false, as the messenger doer thereof had on his deathbed declared upon oath. But, though this might hang the messenger or make him infamous, yet it should not annul the lieges their diligences, who were not *participes fraudis*. See the case of *Ramsay*, notary, cited in the criminal pleadings for *Muire of Auchindrane*, in 1611, who was panelled for killing the *Laird of Cullayne, Tutor of Cassills*. *Vide L. 3tiam, in principio, D. ad Senat-us-consultum Silanianum*.

On the 1st of August, 1677, Sir Andrew Ramsay obtains the gift of the said Affleck's single escheat, upon his own horning against him. *Vide infra, No. 655, [January 10, Seton against Seton.] Advocates' MS. No. 623, folio 296.*

---

1677. July 26. The MASTER OF RAE against The STRANAVER-MEN.

THE Master of Rae obtains a decret against the Stranaver-men for 40,000 merks, as the avail of the hareships and depredations made by them during that inroad into Caitnes in 1668. The depositions of the witnesses amounting to upwards of thirty sheets of paper, the Lords referred to two of their number to peruse; for it had been impossible at any one sederunt to have gone through them all, much less have considered what was proven by two concurring witnesses, and

what not. These two, viz. Forret and Newton, to whom it was recommended, drew them all under general heads, and marked what each of them materially deponed, and how many agreed in one thing.

*Advocates' MS. No. 624, § 1, folio 297.*

1677. *July 27.* The DUKE OF YORK *against* The EARL OF ARGILE.

THE Duke of York, as High-Admiral of Scotland, raised a declarator against the Earl of Argile, that the Spanish ship cast away upon the isles of Scotland *in anno* 1588, being one of the prime ships of that Armada, belonged to him as Admiral, by which office he has undoubted right to all wrecks. See a little of this action in another little MS. beside me.

It was ANSWERED for Argile, that he had the sole right to that ship, because his father had a gift of it from the Duke of Lennox, who was high-admiral for the time, and it was confirmed in Parliament, and clad with possession by taking guns and other things furth thereof.

REPLIED, The gift was null, not being subscribed by his Majesty, though by the narrative it appeared it was so intended, for his Majesty was inserted as a disponder. *2do*, The *quota* to be given to the Duke of Lennox was left blank, which proves it was but an imperfect evident; whereas lately, to ocular inspection, there is filled up the fiftieth part, which is so unsuitable and disproportionate to his interest, that it clearly appears that could never be communed. *3tio*, The Duke of Lennox could not dispose upon that which was not *in illius dominio*; but such was this ship, for the law has condescended on certain ways how property shall be acquired, and has determined that it is not *nudis pactis*, but *traditionibus*. And possession is an essential requisite and ingredient to the constitution of property with us. Now Lennox had no possession of it. And as to those faint deeds of possession that Argile condescends upon; whatever they might import in things lying upon the earth, they can never pass for a sufficient possession of things lying in the bottom of the sea, *in fundo maris*; for they require another kind of possession ere one can have right thereto, and that is locomotion, they must be stirred out of the place that possesses them. This ship is in a manner *sub maris dominio et potestate*, the sea is the *medius obex*, the *medium impedimentum* that hinders acquisition of property in it; this *obex* is not removed nor overcome but by *locomotion*, which Argile cannot pretend to. Then Sir George Lockhart urged, with a great deal of elegancy and subtilty, the parallels of a *fera bestia* wounded, of a treasure found, or of mines in the bowels of the earth, and of the *aper* taken *in rete et cassibus* mentioned by *Ulpian Pomponius Proculus*, in *L. 44 and 45 D. de acquirendo rerum dominio*. Vide supra, *June* 1677, No. 578, anent mines, from act 12 in 1424, and act 27 in 1649. Supra *January* 24, 1677, *the Tortoise*, No. 535. See our 124th act, of Shipwrecks, in 1429. He farther alleged the giving the admiral right to wrecks *in fundo maris*, before he apprehended any possession, was to state the right of property of these wrecks in the person of each admiral, so that he might dispose upon them as freely and absolutely as he might have done upon any other thing that was his uncontroverted property; and at this rate, that ship of the 1588 would, by thir principles, have belonged to the Earl of Bothwell who was