

1677. *February, June, July, and December.* ALEXANDER ARBUTHNOT of KNOX, against STRAITON of LAURESTON, and COLONEL HARY BARCLAY.

*February.*—About this time, Alexander Arbuthnot, brother to the Lord Arbuthnot, competing at Exchequer for the gift of recognition of the lands of Knox, disposed to him by Colonel Hary Barclay, his father-in-law, in his contract of marriage with the said Colonel's only daughter, with Straiton of Laureston, who craved it as having right from the said Colonel and his lady, (who was Laureston's sister:)

The Lords preferred Alexander Arbuthnot. See the information of it beside me; as also anent the gift of escheat, the removing, and the many other actions betwixt the said Colonel Hary and Alexander Arbuthnot, his son-in-law; as also, their defending against the Earl of Marshall's improbation. *Item*, if the gift would be sufficient without mentioning the specific cause whereon it was incurred. See it resolved, *supra*, November 1671, No. 238.

*Advocates' MS. No. 550, § 3, folio 277.*

*June 14.*—In Alexander Arbuthnot of Knox his cause, against Colonel Hary Barclay, (which *vide supra*, numero 550, § 3,) it was resolved by Sir George Lockhart, and so found, that a naked resignation, (whereon no infestment is yet taken or expedite,) either in the King's hands or any other superior's, does not so state the right of the superiority in the person of that superior, in whose hands it is resigned, as to give him the right of the casualties, liferent-escheat, &c.; but if he held base of the granter, and thereon infest, the said annailyer would have right to these intermediate casualties, which are solely produced by an infestment, and not by a charter without seasine, much less by a resignation. See Dury, *23d March 1630, Hay of Tourelands* against Auchnames. *Vide infra*, [No. 652, November 13, 1677,] Strachan of Kimmaldy.

*Advocates' MS. No. 571, folio 284.*

*July 26.*—Alexander Arbuthnot of Knox having, as donatar to the liferent-escheat of Colonel Henry Barclay, obtained decret of removing, and special declarator for maills and duties against the said Colonel Henry, and his tenants of Knox and Tullos, before the sheriff of Kincarden;—the Colonel suspends on thir reasons, *1mo*, That the said Alexander, though donatar, yet not being a creditor, had no interest, his back-bond being satisfied; and the Colonel had obtained, at the Exchequer, a second gift of his own escheat. *2do*, As for the debts that either Alexander, the charger, or his brother, the Viscount of Arbuthnot, had paid for him, they promised, at the time of Alexander's marriage with the Colonel's daughter, they should never charge him with them, because they had got the fee of his estate.

ANSWERED, to the first,—We opposed the back-bond which declared the Colonel's escheat was gifted to Alexander for securing him in the right of the lands, which was not yet done, &c. and scarce one point of the back-bond was fulfilled; likeas, he had not given in a revocation of the right *stante matrimonio* granted by him to his lady. As to the second, We found it relevant that Alexander promised *scripto vel juramento*.

They craved the Viscount might also depone if he promised; which Gosford sustained. Whereupon, both deponing *negative*, the letters were found orderly proceeded, both in the removing and maills and duties. And, in the re-

moving, the sheriff having been charged on 15 days to do his office, and refusing, letters of ejection were got forth; which at last he obeyed.

On the 1st of August, 1677, Alexander Arbuthnot obtained past at Exchequer a signature of resignation and confirmation of his base infeftment in the lands of Tullois; and Straiton of Laureston seeking, at the same time, a confirmation of the base right of the lands of Knox, granted by Colonel Henry to Margaret Straiton, his lady, and sister to the said Laureston;—it was waved, in regard double confirmations are forbidden by law, viz. the 66th Act of the Parliament in 1578; and double dispositions are declared stellionate, by the 102d Act, Parliament 1540. *Vide supra* in *February* 1677, No. 550, § 3, and in *June* last, *numero* 571. See the large informations upon all thir affairs of Knox and Colonel Hary Barclay, beside me.

*Advocates' MS. No. 622, folio 296.*

*December* 14.—Alexander Arbuthnot of Knox pursues a declarator of recognition of the lands of Knox, as donatar, against Colonel Hary Barclay and Margaret Straiton, his spouse. *Primo*, It was DENIED the lands held ward. ANSWERED,—*Imo*, Ward is presumed, unless another holding be instructed. *2do*, We produced Colonel Hary's own charter bearing ward. This allegiance was repelled.

Then they ALLEGED,—That the disposition whereupon the alienation and recognition was alleged to have been incurred, was not absolute but conditional to his wife, failyieing of children procreated betwixt them; so that the fee and property were not immediately transmitted and devolved, but suspended during the dependance of that condition; and such an alienation neither imported contempt nor recognition.

ANSWERED,—This downright choked the principles of the feudal law, by which such rights, under conditions, did not salve the forefaulture; as was evident from Craig, *Feud.* p. 344, and from Stairs, in his System, *titulo* Of Extinction of Fees, p. 375. And this allegiance was already repelled in the case of *Cranburne* and *Carnegie*. See Craigie's Collection, *verbo* Recognition, *folio* 134.

The Lords fearing that, if this recognition were declared, the donatar would sweep the relict (for Colonel Harry died during the dependance,) quite out of her jointure; they first prevailed with him to give a declaration, that this recognition should not prejudice the provision settled on her by her contract matrimonial; after which, the Lords found recognition was incurred by that disposition, though conditional.

The relict's procurators dealt likewise to have what her husband had provided her to *stante matrimonio*, secured and reserved to her; but that was refused. See the information in this cause.

*Advocates' MS. No. 687, folio 312.*

See the remaining parts of the report of this case, Dictionary, pages 13,160, 13,389, 6,761; *et infra*, 15, December 1680.

1677. *December* 15. DAUGHTERS of SIR THOMAS NICOLSONE and their Husbands *against* SIR JOHN NICOLSONE.

THE cause between Sir John Nicolsone and the Daughters of Sir Thomas Nicolsone of the first marriage, and Eleis of Southsyde, Scot of Malleny, &c. their Husbands, came to be decided: wherein Sir John was found liable to them