

were two decisions conform to this before, *viz.* 17th *February* 1663, *Hay* against *Morison*; and 10th *July* 1677, *Carnegie and Smith* and *Mr Thomas Baird*.

*Advocates' MS. No. 709, § 6, folio 316.*

1678. *January 17.* SIBBALD of KAIR *against* FALCONER of GLENFARQUHAR and GUTHRIES.

IN an exhibition pursued by Sibbald of Kair against Falconer of Glenfarquhar, and Guthries, of some writs; in regard the defenders Guthries were not personally apprehended on the second summons, therefore the Lords found their procurator was not obliged to take a day to produce them, to depone anent the having of the papers called for, since they could not be holden as confessed; albeit it was alleged, that they lurked and kept themselves out of the way of purpose, or for fear of caption. *Advocates' MS. No. 710, folio 316.*

1678. *January 18.* JAMES DEANS *against* SIR WILLIAM PURVES.

THERE was a competition between James Deans, in the Canogate, and Sir William Purves, solicitor, anent the right to a sixteenth part of a ship which belonged to Francis Aird. Sir William claimed right, as donatar to Francis Aird's single and liferent escheat, and whereon he had obtained a decret of general declarator. James Deans his right was an assignation from Francis, and intimated; who alleged Sir William's decret was in absence and null; because every such declarator has two conclusions: one that the party was rebel, and orderly denounced; the *second*, that the pursuer was donatar to that casualty of rebellion. Now, though this second was proven in his decret, by production of his gift mentioned therein, yet he had produced no hornings therein, though the gift narrated three; and so the decret was intrinsically null, for lack of probation of the first point.

ANSWERED *1mo*,—It was but *vitiū transcriptoris*; he would mend it, and abide at it; for the hornings were as truly then produced as his gift was. But, *2do*, *Esto* he had no declarator, he must be preferred to James Deans, because the common author, Aird, was denounced before the making of that assignation; and so, there being a *jus quæsitum* to the fisk, he could do no act in prejudice thereof.

REPLIED,—We must first see the hornings, to object against them; for they may have nullities and informalities. Newton ordained us to see the hornings.

*2do*, REPLIED,—That James Deans his assignation and intimation being before Sir William's gift of escheat and declarator, though it be posterior to the denunciation itself, it must be preferred; as was found in Dury, *20th November* 1623, *Hamilton*.

DUPLIED,—The assignation in that practick was not altogether voluntary, but in obedience to a caption. *2do*, The Lords have clearly decided since this case, and preferred the donatar wherever the assignation is after the denunciation; and particularly in the case of *William Veitch* and *Peter Pallat*: where