

1687. *November 23.* JAMES GRAHAM *against* SAMUEL SOULTON.

THE Lords advised the probation in James Graham, bailie of Edinburgh, his process against Samuel Souton and the other owners of the Calmar. He had transacted with one Chapman in Kirkaldy, for his part of that ship, and afterwards *viis et modis* he retired that discharge and cancelled it; and then pursued the other partners for his share, and before the Admiral gave an oath, which was alleged to be contradictory.

The Lords found the tenor of his discharge to Chapman proven, and the trust made out, and therefore assoilyied the defenders. *Vol. I. Page 482.*

1687. *November 26.* GRAY OF BALBUNNOCH *against* GRAY.

THE case of Gray of Balbunnoch and Gray was advised. The Lords found the Earl of Strathmore was superior of the lands of Bulleon, and that there was no recognition thereof by the Lord Gray's deed; and therefore reduced the defender's rights. *Vol. I. Page 483.*

1687. *November 29.* The EARL of AIRLY *against* JOHN DEMPSTER of PITLEVER.

BALKASKIE reported the Earl of Airly's reduction of Mr John Dempster of Pitlever's rights of his lands of Balbugie, on an old comprising led in 1536, and which was prescribed; but Airly got an Act of Parl. in 1681, subducting 12 years in Cromwell's time from the prescription, as if Airly had been *non valens agere* then. ALLEGED,—The service and retour is after the summons, and his seasine is posterior to the very calling of it by the clerk, and so was *filius ante patrem*. ANSWERED,—This was good against singular titles, *v. g.* if one's assignation was after the summons; see Stair, *15th November 1666, Abercrombie*. But, in an universal title as heir, it was drawn back, the service being founded on the *jus sanguinis*, and only declaratory of it.

The Lords refused to sustain process.

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1686 and 1687. DOCTOR WILLIAM ECCLES *against* SIR JAMES ANSTRUTHER'S HEIRS and JOHN WEDDERBURN.

1686. *November 24.*—MR William Eccles, doctor of medicine, his reduction and declarator against Sir James Anstruther's heirs, and Mr John Wedderburn of Blackness, clerk to the bills, is debated: and they clothing themselves with

the decret-absolvitor from his gift, as *tuti exceptione rei judicatae*; it was ANSWERED,—that was only *in possessorio*, which could not hinder his declarator of right *in petitorio*; and that *sententia debet esse conformis libello; et, ultra id quod in judicium deductum est, potestas judicis excedere non potest*,—*l. 18 D. Commun. Divid.*: and the mentioning of his title is of no moment, *quia titulus debuit allegari, ad colorandam possessionem*, that it was not *clam, vi, nec precario*. *2do*, Bartolus, *ad l. 12 D. de Acquir. et Om. Possess.* says, *In dubio*, whether the *petitorium* be cumulated as well as the *possessorium*, *standum est declarationi libellantis*; and here the conclusion of Mr Eccles's bill, which is the *regula regulans* of the whole bill, bore only restitution to the possession of his office till his right were quarrelled, and he heard on all his lawful defences; and that though he had no warrandice on the granter's heirs, yet, *per l. 11; § ult. de Act. Empt.*, *pretium est ei restituendum*, in case of eviction. But the President said to this, If one sell lands with warrandice only from his own fact and deed, if the distress and eviction arise *aliunde*, he will not be obliged to restore the price. It was likewise alleged, Mr Eccles was in *Mr Hary Oliphant's case*, (*vide 30th November 1683*;) by the quality of Sir James Anstruther's gift, which gave him the office not during his own, but during Sir William Bruce's lifetime. *Vide 30th November 1686.* *Vol. I. Page 430.*

1686. *November 30.*—The case of Eccles and Wedderburn, mentioned 24th current, was advised. The Lords having considered the petition given in by the said Mr William Eccles, and Blackness's answer, and the decret-absolvitor following thereon, they found there was no more then under consideration but the possession; and that the point of right could not be thereby determined: and therefore reduced the said decret, and reponed Dr Eccles against the same, and found his defences, as to the point of right, entire: but, as to his conclusion of declarator against the Register, Balcaskie, and the clerks of the bills, referred it to Forret and Carse to agree them, either by restoring him to his place, with the bygone profits, or giving him a sum of money for the same; and decerned against Sir John Anstruther's heirs in absence, none appearing for the minor. *Vide 29th November 1687.* *Vol. I. Page 432.*

1687. *November 29.*—The case of Dr Eccles against the Register and the Clerk of the Bills, mentioned 30th November 1686, was farther debated. The defenders ALLEGED,—*1mo*, The parcelling out and multiplying of new offices in the bill-chamber multiplied expenses, and extorted the lieges. But this would put out James Sinclair, as well as the Doctor. *2do*, That Blackness was a singular successor, for he knew, before his entry, Mr Eccles's right. *3tio*, That the pursuer had lost his place by his not attendance; and though he had a license, from Sir James Anstruther, to go abroad and study, yet, so soon as he died, it expired, being *mandatum personale quod morte mandatoris extinguitur*; and he should instantly have returned home, which he did not: and for this non-attendance, Sir William Primrose was deprived from being clerk to the notaries: and they also cited *Commissary Fleming and Nimmo's case*, from Stair, 11th July 1672.

ANSWERED,—Sir James Anstruther's dispensation did not die with him; for his gift lasted all the days of Sir William Bruce's lifetime; and though residence be essential in offices, yet *Abbas Panormitanus, cap. extra, de Clericis*

*non residentibus*, requires two conditions: 1mo, That there be lesion and prejudice by the absence. 2do, That they be *moniti et requisiti revertere*: none of which can be subsumed here. And Sir William Primrose was not deposed for non-residence, but for not bringing in the notary's prothocal books, conform to the 22d Act Parl. 1617. And it is by the injunctions of the books of Sederunt that Commissaries must reside.

And yet this was not required by the decision, 6th February 1666, *Archbishop of Glasgow against Logan*.

This case being submitted to the President, the Doctor got 2700 merks for his 4000, and the intermediate profits. *Vol. I. Page 483.*

1687. November 30. *ERSKINE of ALVA and STIRLING of AIRDOCH against GEORGE RAMSAY.*

THE case of Erskine of Alva and Stirling of Airdoch *against* Major George Ramsay, was reported by Kemnay. Sir Alexander Hope of Granton having given his Lady, Dame Anna Bill, a disposition to his moveables, it was quarrelled by thir legatars of Sir Alexander's, as *donatio inter virum et uxorem*, and revoked by his posterior testament leaving thir legacies. The Major, as assignee to the Lady, for fortifying it, offered to prove it depended on this onerous cause, that Sir Alexander got £2800 sterling of tocher with her, out of the Chamber of London. And a commission having been granted for proving it, the term was circumduced, and decret given: which was suspended on this reason, that, the commission being directed in 1684, they could not then get it executed, because, the King having issued out his writ of *quo warranto* against the city of London's charter, it was declared void, by the Lord Chief-justice Sanders, and there was no access to their writs and archives; and so they were not *in culpa aut mora*; and it was only an act before answer. REPLIED, —The onerous cause was admitted only to be proven by a writ under Sir Alexander's own hand, and not by extrinsic records, as recognizances, and statute staple, which are not probative with us; but the Lords had reserved to themselves to consider what these should operate.

The Lords, on Kemnay's report, turned the decret into a libel, and reponed the defenders, they paying £40 of expenses for that decret; and renewed the commission to London, to be reported against the 10th of January next.

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1686 and 1687. *ALEXANDER HAMILTON against SIR JOHN RAMSAY of WHITEHILL and DAVID PLENDERLEITH of BLYTH.*

See the prior part of the Report of this case, Dictionary, page 16,404.

1686. December 17.—*ALEXANDER Hamilton against Ramsay and Blyth,*