

1738.

BURDEN

v.

SMITH.

“locutor, whereby the Lords adhered to the inter-
 “locutor of the 19th June, be, and the same is
 “hereby reversed; and that the interlocutor of the
 “said 10th February, whereby the said Lords of
 “Session found ‘that there was no legitim in this
 ‘case,’ be, and the same is hereby reversed; and
 “it is hereby declared, that the said children were
 “entitled to a legitim in this case; and it is here-
 “by further ordered and adjudged, that so much
 “of the said interlocutor of the 20th of the same
 “February, which is contrary to, or inconsistent
 “with, this judgment, be, and the same is hereby
 “also reversed; and it is further ordered, that it
 “be remitted to the said Lords of Session to pro-
 “ceed accordingly.”

For Appellant, *Ch. Areskine, W. Murray.*

For Respondent, *W. Hamilton, J. Graham.*

The MAGISTRATES of MONTROSE,	-	<i>Appellants;</i>
DAVID ERSKINE of Dun, Esq. one	}	<i>Respondent.</i>
of the Senators of the College		
of Justice,		

12th May, 1738.

PROCESS.—APPEAL—It being objected that the Lord Advocate, who had an interest in the cause, and who had been a party in the Court of Session, was not made a party to the appeal; and that the cause had not been finally determined in the Court of Session;—the appeal was dismissed.

No. 44.

JAMES V. by a charter under the Great Seal, granted to Sir James Erskine of Brechin, his heirs and assignees, the right of Constabulary of the Burgh

of Montrose. Sir Thomas conveyed it to Mr. Erskine of Dun, the ancestor of the respondent.

The office not having been exercised for a considerable period, and the respondent's right to it, as well as the nature and extent of the jurisdiction being disputed by the magistrates of Montrose, he, in 1728, brought an action for having his right to the said office, with all its privileges, ascertained and declared.

In defence it was, *inter alia*, pleaded that the grant, being of an office in fee, was void in terms of an act of James II. (1455, c. 44.) "That there
" be nae office in time to come given in fee and
" heritage, and that the offices that are given since
" the decease of our Sovereign Lord that dead is,
" be revoked and annulled."

It was answered that the statute founded on had gone into desuetude, there having been several offices granted in fee since that time; but at all events, that the objection was not competent to the magistrates, but only to the crown, who was not a party to the process.

The Lord Ordinary (July 8, 1730,) "repelled
" the defence founded upon the Act of James II.
" concerning jurisdictions *in hoc statu*, the crown
" not being in the process."

The magistrates afterwards raised a summons for the purpose of calling the Officers of State on behalf of the crown; and they likewise brought an action of declarator to have it found that the burgh of Montrose was exempted from any jurisdiction of the respondent.

The actions being conjoined, the Lord Ordinary, after various proceedings, pronounced an interlocutor, which was adhered to by the Court, (14th Fe-

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bruary 1733,) finding that the respondent “ had
 “ right to the constabulary of Montrose, with all
 “ rights and privileges thereto belonging.” And
 the cause being remitted to the Lord Ordinary, to
 hear parties on the extent of the jurisdiction, his
 Lordship (July 4,) “ found and declared, that the
 “ pursuer hath right to a jurisdiction in matters of
 “ riot within the town of Montrose and liberties
 “ thereof, cumulative with the town, in such cases
 “ wherein, by their erection, they have power to
 “ judge; and that he hath right to the town pri-
 “ son or tolbooth, to imprison delinquents in.”

Thereafter the respondent was ordered to give
 in a condescendence of what further points of juris-
 diction he claimed, which being lodged, the Lord
 Ordinary, (22d February 1734,) “ allowed the
 “ council for the town to see and answer the same
 “ against the 1st June next; but allowed the pursuer
 “ to extract the decree already pronounced,” &c.

Entered
 Feb. 16, 1737.

Before, however, these answers were lodged,
 or any farther proceedings in the case took place,
 the present petition of appeal was brought from
 various interlocutors prior in date to that of 22d
 February above-mentioned.

Judgment,
 May 12, 1738.

The council for the appellants being directed
 to proceed, the respondent’s council objected
 thereunto, and acquainted the House, ‘ That not-
 ‘ withstanding the interest of the crown was con-
 ‘ cerned, yet his Majesty’s Advocate for Scotland
 ‘ was not made a party to the said appeal.’ And
 the appellants’ counsel having been heard there-
 unto, the counsel were directed to withdraw.
 “ And it appearing to the House, ‘ That though
 ‘ the interest of the crown was concerned, and his
 ‘ Majesty’s advocate made a party below, yet the..

‘ said Advocate is not made a party to this ap-
 ‘ peal ; nor was the cause finally determined by
 ‘ the said Lords of Session :’

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“ It is therefore ordered, &c. That the said pe-
 “ tition and appeal be, and is hereby dismissed
 “ this house ; and that it be, and is hereby remit-
 “ ted to the Court of Session in Scotland, for that
 “ Court to proceed in the cause according to law
 “ and justice, and to determine thereupon, with
 “ respect to the points which remain undetermin-
 “ ed, and that afterwards the parties on either side
 “ be at liberty to appeal to this House, as they
 “ be advised.”



GEORGE, MARQUIS of Annandale, - *Appellant* ;
 The EARL and COUNTESS of Hopetoun, *Respondents*.
et è contra.

15th February, 1739.

MUTUAL CONTRACT.—PASSIVE TITLE—ACT 1695, c. 24.—Cir-
 cumstances of an obligation incurred by an apparent heir,
 under which the next heir, passing him by, and serving to a
 remoter ancestor, was found liable, without relief against the
 executry, or other separate estate of the apparent heir.

[Elchies, No. 12—*voce* Mutual Contract.]

JAMES, Marquis of Annandale, succeeded to the No. 45.
 title and estate of Annandale in 1721. Shortly
 afterwards, by the death of his younger brother
 William, the succession to the maternal estate of
 Craigiehall opened to his sister, the Countess of
 Hopetoun, who was the first substitute then in ex-
 istence. . But the right of the Countess was de-