

executed against them at the instance of the debtor, who had obtained suspension of the pursuer's decret. The Lords repelled this allegiance, in respect the pursuer offered to prove, that before the suspension was purchased by his debtor, and before any charge was given to the bailies to put him to liberty, the debtor was out of ward, and had free course by repairing to the streets at divers times. Which answer the Lords found relevant; for the Lords found it was not enough for the magistrates to incarcerate and take the rebel, except he were detained in prison, and kept therein, until he were freed by order of law; and therefore, albeit he was thereafter *ex post facto* relieved by a warrant, yet they stood debtors to the party, because he was put out of ward before they had any warrant: neither was this respected by the Lords to free the bailies, that they offered to restore him to ward *cum omni causa*, and that any freedom he had before the suspension, they would be answerable therefor to the pursuer, concerning any deed done to his prejudice during that time, whereby he might be found less *solvendo*, than when he was put first in ward; and so seeing the party had no prejudice, and that they should enter the rebel *cum omni causa*, they ought not to be decerned to pay the debt. Which allegiance was repelled; for the Lords found, that the warding is a punishment of the debtor, from the which the magistrates cannot relieve him at their own hand, but upon hazard of the debt; and therefore sustained the action.

*Act. Lawtie. Alt. ———. Scot, Clerk. Vid. 30th March 1626, Gemmel against Bailies of Glasgow; and 20th November, 1623, L. Aytoun.*

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1623. *March 28.* The MASTER of LAUDERDALE *against* the VASSALS of the PRIORY of HADDINGTON.

THE priory of Haddington, being erected in a temporal barony to the Master of Lauderdale, in the Parliament 16 years: in the which Parliament also, Sir John Scot obtained a ratification of his infeftment of the lands of Pittarchy, which was disposed of before by the king, to be holden of the king, by virtue of the act of annexation; the same lands before the act of annexation, being holden of the abbey and priory of Haddington:—the Master of Lauderdale intends an action of improbation against the vassals of the priory, erected to him as said is, and amongst others against the said Sir John, for production to him of his evidents of the said lands. In the which action the said Sir John comparing and defending himself, that he could not be compelled to produce at the instance of this pursuer, in respect he was vassal to the king by the annexation; likeas his infeftment so granted to be holden, was ratified the same time by that same Parliament, wherein the erection was expedite, and so the pursuer was not his superior:—this allegiance was repelled by the Lords; and the defender ordained to produce at the pursuer's instance, as was craved by the summons, being an action wherein the pursuer alleged all the writs made to him by the priors, or since by the king, of these lands, to be false.

*Act. Hope. Alt. Stuart and Cunningham. Scot, Clerk. Vid. 25th July 1622, E. Nithisdail.*

This decision in my opinion solves not the doubt, if Sir John, or such others

as are in the like case, or have been vassals to the lords, who have obtained erection of the benefices after rights made, by virtue of the act of annexation, to others, of lands to be holden of the king; but the doubt remains yet undetermined, for, in this decision, there was a necessity for Sir John to produce, seeing he was called to produce his evidents made to him by the priors, and sensine as false, the pursuer who might do all that the priors might have done, had reason to see if Sir John had right to the lands or not; but, if the writs were produced, it appears yet to remain free and unprejudged to the excipient, to dispute, in its own time and place, that he is not his vassal, but only the king's.

*Vid.* 7th February 1627, John Stuart.

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1623. June 11. The KING and the EARL of HUME *against* CRANSTON.

LITISCONTESTATION being made in the action of improbation pursued at the King's instance and the Earl of Hume's against Cranston of Moriston, an incident being raised, only at the Earl of Hume's instance, for proving of such points as, by the act of litiscontestation, were admitted to his probation; which incident was not also raised at the king's advocate's instance;—the Lords, notwithstanding thereof, sustained the incident, because the advocate concurred and declared that he insisted therein with the party.

*Act.* Hope and Belshes. *Alt.* Nicolson and Craig. *Vid.* 10th February 1624, E. Buckcleugh *against* Lord Yester, and the cases there.

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1623. June 23. The EARL of MARR *against* LORD ELPHINGSTOUN.

In an improbation pursued by the Earl of Mar, against the Lord Elphingstoun, as use is in such cases, there being a general clause in the summons, whereby the defender was called to produce, by and attour the particular evidents especially set down in the summons, all and whatsoever writs and evidents, made by such or such persons, of the lands libelled, as such summons usually reports; and incident being used by the defenders, for recovering of the same writs specially libelled; in the which incident the defenders, who were thereby called as havers, were also called for having all and sundry other writs, conform to the general clause contained in the summons of improbation: which general clause of the incident being quarrelled by the pursuers of the principal cause of improbation, alleging that that generality could not be sustained in that incident, because no person could be convened as haver, except of some particular designed writ, and not of such generality, whereupon no improbation could be led; and albeit that clause was contained in the principal summons of improbation, yet that could not be a reason to sustain that general clause in the exhibition or incident, seeing, in the improbation, he was not holden to prove any thing, but conceived his libel *negative*, that there were never such evidents, and if any was, the same were false: against the relevancy of the which generality