

1662. June 18. Earl MARISCHAL *against* CHARLES BRAY.

THE EARL of Marischal having obtained decret, in his own baron court, against Bray, compearing for a year's rent of his Mains of Dunnottar, wherein he had been possessed by the English; Bray suspends, and *alleges* compensation upon a bond assigned to him, due by the charger, who *answered* competent and omitted, and so not receiveable in the second instance; especially being compensation, which, by special act of Parliament, is not to be admitted in the second instance.

THE LORDS sustained the reason of compensation, and found that a baron court was not such a judicature, as that allegeances competent and omitted should be repelled in the second instance.

*Fol. Dic. v. 2. p. 209. Stair, v. I. p. 111.*

1664. December 10. LYON of Muirask *against* Sir ROBERT FARQUHAR.

MUIRASK having pursued a declarator of redemption of the lands of Balmellie, against Sir Robert Farquhar, litiscontestation was made in the cause, wherein the order was sustained, proceeding upon an adjudication against Sir John Urquhart, as heir to his goodsire, and it was offered to be proved, that he died in the right of the reversion of this wadset, which was but base and holden of the granter, for proving whereof his charter was produced, bearing the barony of Craighfintrie and Balmellie, *per expressum*. At the advising of the cause, it was *alleged*, That the defender having protested for reservation, *contra producenda*, it is now instantly verified, that the grandfather died not in the right of the reversion, but that he was denuded by disposition to his son, instructed by his charter produced. The pursuer *answered*, That he opposed the state of the process; and if such a defence were now competent, it ought to be repelled, because he hath right from Sir John Urquhart, who is heir served and retoured to his father, in whose favours his grandfather was denuded, and has declared that he consents to the declarator upon that ground, and renounces all other right. The defender *answered*, That the order having been only used upon the adjudication from Urquhart, as heir to his grandfather, if that be excluded, albeit the pursuer have another right, he must use the order *de novo*, and redeem thereupon. *2do*, Sir John Urquhart's right produced renounces, but does not dispone any right to the pursuer.

THE LORDS having considered the state of the process, found that a reply instantly verified, is receiveable *post conclusum in causa*, unless it were alleged to have been known to the proponent, and *dolose* omitted, by which the pursuer might be put to a duply, suffering new probation. But the LORDS found, that the charter produced, bearing the grandfather to be denuded, did not instantly

No 366.

A baron court is not such a judicatory as can give any ground for the objection of competent and omitted.

No 367.

A reply instantly verified is receiveable *post conclusum in causa*, unless it has been *dolose* omitted.

No 367. verify, because it expressed not Balmellie; and would not allow a term to prove part and pertinent.

It was further *alleged* by the defender, no declarator till the sums consigned were produced at the bar, especially seeing it was offered to be proved, that the pursuer lifted them himself, and he being at the bar, it is instantly verified.

THE LORDS sustained the same, and declared the sums being reproduced before extract, and that the pursuer shall be liable for annualrent, or the wadsetter shall retain the duties effeiring thereto.

*Stair, v. 1. p. 239.*

1667. July 23.

HANS JURGAN *against* LOGAN.

No 368.  
Competent  
and omitted  
before the  
admiral,  
could not  
operate a-  
gainst stran-  
gers, *qui*  
*utuntur com-*  
*muni jure*  
*gentium.*

CAPTAIN LOGAN, a privateer, having taken Hans Jurgan, citizen of Lubeck, obtained his ship and goods, adjudged prize by the Admiral, upon this ground, that he had carried in prohibited or contraband goods to the Danes, being then the King's enemies, viz. hemp and victual, and that he was taken in the return of that voyage, which was instructed by the oath of the said Hans and sailors; Hans raises a reduction of the Admiral's decret, on these reasons; *imo*, That the victual was no contraband goods, but such goods as the King allowed his own subjects to export out of England, and declared that there should be no question thereupon, nor upon any goods not enumerated in an act of council produced, all which are *bellica* instruments and furniture, and have nothing of victual; and albeit hemp be prohibited by that act, and commonly counted contraband goods, yet the quantity deponed was only sixteen stones, which is an unconsiderable quantity, and necessary for calfing the ship, and sewing the sails. *2do*, The pursuer produced the Duke of York's pass, warranting this ship to come from Bergen, and therefore she could not have been taken in her return by any privateer. *3tio*, Whatever might have been alleged, if the ship had been taken, having unfree goods in her, there is neither law nor custom to seize upon the ship in her return, when these goods are not in her, for the ship might have been sold to another than he that did the wrong; and it cannot appear, whether the return was made out of the price of the former freight, and though it were, it might be of a hundred times more value. And albeit such seizures in return were allowable, yet they could only be sustained when it is evident, at the time of the seizure at sea, that the contraband goods had been in the ship that voyage, either by bills of loading, charter-pieces, or other writs taken in the ship, or by the oaths or acknowledgments of the company, otherwise upon that pretence freedom of commerce would be altogether stopped, seeing every ship might be brought in, that they might be tried by the Admiral, whether or not they had in contraband goods that voyage. *4to*, These strangers could not be *in culpa* before the indiction of the war could