

1666. *July 4.* JEAN CUNINGHAM *against* CUNINGHAM of ROBERTLAND.

JEAN Cuningham, as donatrix to the escheat of umquhile Sir David Cuningham of Robertland, pursued general declarator against his son: who alleged absolvitor, because the horning was null, seeing the charge and denunciation was only at the market-cross of Edinburgh, whereas, by the Act of Parliament 1597, c. 294, all hornings executed against persons within the realm, dwelling within bailiaries or stewardries, should be executed at the head burgh thereof. *Ita est* umquhile Robertland had his dwelling-house at Robertland, within the bailiary of Cuningham, albeit for a time he was out of the country and was a prisoner of war for the king. The Lords repelled the defence, and sustained the horning, and found that the Act of Parliament met it not; seeing neither the person denounced was within the realm, nor dwelt within the bailiary at that time, but had remained several years in England.

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1667. *February 23.* ————— *against* —————.

THIS day there being a query formerly given by the Lord Treasurer, Whether or not there should be a process of forfaulture intended against those who rose in the late rebellion, before the Justice-General, so that the Justice might proceed against them, though absent, by putting the dittay to the trial of an assize, and taking witnesses thereupon; and, upon probation, to proceed to the sentence of forfaulture: or whether probation in absence could not be admitted but before the Parliament:—There were reasons given with the query for the affirmative, *viz.* that there was a special statute for forfaulture of persons after their death, in which case they were absent,—*multo magis* when they were living and contumacious. *2dly.* Because, by the civil law, albeit probation, especially in criminals, cannot proceed unless the defender be present, yet the chief criminal doctors except the case of lese-majesty, as *Clarus Farenatius* and *Bartolus*. *3dly.* That the Parliament proceeds to the forfaulture in absence, not by their legislative authority, but as a judicature; and what is just by them, it is just also by the Justice. The Lords demurred long to give their answer, upon thir considerations, That, by Act of Parliament, it is statuted that probation shall be only led in presence of the party; and that there had never been such a practice for the Justices to forfault absents, but only to declare them fugitives; whereupon, being denounced, their escheat fell, and after their liferent: and that it was not proper to the Lords, especially in cases criminal, to give advice in that which might predetermine the Justice-General and the Justice-Clerk and Advocate, who had been desired to peruse the books of adjournal, and they reported, that they had not found a forfaulture by the Justices in absence; but that they had found that a party accused for treason in holding out a house against the king, was declared fugitive, but they did not find that it was proponed to the Justices to put an absent to an inquest for treason, and that it was repelled. The matter being resumed this day, the plurality resolved for the

affirmative : especially considering that, of old, Parliaments were frequent in Scotland, and now are but rare ; and that the Lords of Council and Session were the king's council, to give his Majesty their advice, in general cases, what might legally be done, whether civilly or criminally.

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1667. *December 10.* MR JAMES STRAITON *against* The COUNTESS of HOME.

MR James Straiton, minister of Gordoun, having obtained decret conform, upon an old locality, charges my Lady Home for payment ; who suspends, and alleges, That she must be liberated of a chalder of victual contained in the decret of locality ; because, after the said decret, a part of the parish of Gordoun was dismembered, and erected in a new parish, and the Earl of Home burdened with a new stipend, and the minister of Gordoun liberated of a great part of his charge ; in consideration whereof, the minister, then incumbent, quitted a chalder of his decret of locality, and acquiesced in the rest, without ever demanding any more ; and so did his successors now by the space of sixteen or twenty years. The charger answered, That his predecessors' forbearance to lift that chalder cannot instruct his consent ; and, though he had expressly consented, he could not prejudge his successor, unless that chalder had been applied to the new kirk by sentence of a judge. The Lords found the foresaid reason relevant against the pursuer, *in possessorio*, aye and while he declare his right. Here it was represented, That the minister had a sufficient stipend beside the chalder in question.

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1668. *January 28.* ROBERT DOBBY *against* The LADY STANYHIL, his Mother.

ROBERT Dobby pursues the Lady Stanyhil, his mother, for an aliment, upon this ground, That, she being provided to a plentiful liferent, being an annualrent of 2,800 merks yearly, there remains nothing to aliment him, the heir, of free rent, being all exhausted by the liferent and annualrent of the debt. The defender alleged Absolvitor, because there is no ground in law nor custom for an aliment to the heir, except the rents were exhausted by real burdens by infestment. But here, at the defunct's death, there was only this liferent, which was not the half of the rent, and there was no infestment more. *2dly.* Aliments are only competent to minors : The pursuer is major, and may do for himself. The pursuer answered, That it was alike whether the debts were personal or real ; for, if appraisings had been used, they would all have been real ; but the pursuer did prevent the same, by selling a part of the land at a great rate, which was all applied to the creditors, and yet the liferent and annualrent of the debt is more than the rent. Neither is there any distinction in the law as to majors and minors, who were not bred with a calling ; and therefore Carberry (who was a man of age) got an aliment ; and Anthonia Brown got an aliment from her mother, who had an annualrent in liferent, and the debts were