

1677. *July.* The CHILDREN of Captain ROBERT LEIRMONT *against*

IT was found by the Lords, that some had forged the seal of the office of the College of Justice, in a case between the children of Captain Robert Leirmont and a stranger, about a commission for trying somewhat abroad.

*Advocates' MS. No. 620, § 1, folio 296.*

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1677. *July.* EARL of DUMFREIS *against* HAY of Hayston.

THE Earl of Dumfreis gave in a bill to the Lords against Mr John Hay of Hayston, their clerk, complaining of him that he had interlined his name in a petition, making him consenting to an act very prejudicial, without any warrant from him.

*Advocates' MS. No. 620, § 2, folio 296.*

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1677. *July 26.* The CREDITORS of ELIZABETH HERIOT *against* SIR ANDREW RAMSAY.

IN the case of the Creditors of Elizabeth Heriot against Sir Andrew Ramsay, in whose hands they had arrested her annuity yearly of 300 merks; it went to the Lords' answer, whether this money, being of the nature of an aliment, was arrestable, yea or not. They found it was, in the general case; and arrestable, because it had succeeded in place of real rights upon the estate of Waughton, that she and her husband had disposed to Abotshall. *2do*, There was a speciality in Isaack Brand, baxter, his debt, who was one of the arresters, because it was contracted for meat and drink; and so being alimentary too, was equally privileged, for *privilegiatus contra privilegium non gaudet suo privilegio*.

II. It was doubted how far an arrestment of an annuity will affect and reach, whether the whole year or only the term and current half-year, which is the opinion of some. See Sir G. Lockhart's information for my father against the Laird of Nidry, about arresting the rents of Carington by Nidrie.

*Advocates' MS. No. 621, folio 296.*

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1677. *July 26.* SIR ANDREW RAMSAY of Waughton *against* WILLIAM AUCHINLECK, Maltman in Preston.

JOHN SMITH, chamberlain to the said Sir Andrew, having, in February 1676, sold 200 bolls of Sir Andrew's bear to this Affleck at L.11 or L.12 the boll; and ere the term of payment came, the markets and prices of victual falling consider-

ably, Affleck refused to stand to his bargain, except he were eased of 100 bolls; and as to the 100 bolls, he craved a long day. On this they differing, John Smith was necessitated to pursue him before the Commissaries of Edinburgh: where he proponed this peremptor, that the first bargain was innovated and resiled from by the second communing: which was taken off by this reply, that no respect could be had to the second communing, because it was never a complete agreement, nor perfected by writ as was appointed. This reply being admitted to probation, and witnesses led thereon, and advised by the Commissaries, they decerned for the hail 200 bolls.

On the 26th of February, 1677, Auchinleck presented a bill of suspension, and likewise gave in a bill to the hail Lords, complaining of the Commissaries' partiality and injustice; and desiring either the Lords themselves, or to delegate some of their number, to call for the testimonies of the witnesses, and compare whether the reply was thereby proven, yea or no.

The Lords, by their deliverance of the 27th of February, having considered the bill, and desire thereof, ordained the Commissary Clerk to deliver the hail process to Mr Thomas Hay, clerk to this present process, and appointed letters of horning to be directed for that effect; and till the conclusion of the depending cause, and discussing of the reasons of suspension, discharged any execution to be used at the instance of the charger against the petitioner.

In June, it being, upon a bill given in by the charger, recommended to Newton, and being called by him, it was alleged that the reply was not proven in the precise terms, and *in tota latitudine*, as it is proponed. ANSWERED,—There was as much proven as was necessary *ad victoriam causæ*; and if the inferior procurator had ignorantly and superfluously burdened himself with proving that which was not relevant, it ought not to prejudice the charger. Yet see *supra*, where the Lords declared they would not admit that allegiance of a probation sufficient *ad victoriam causæ*; because parties sometimes, on the confidence that an entire allegiance, as it is proponed, can never be all proven, will of consent find it relevant, and will not be scrup or critical in examining its justice or relevancy. See Stair's Decisions, *January 25, 1662.*

The debate being reported by Newton on the 22d of June 1677, and the Lords having considered his report, with the defences and reply admitted to probation before the Commissaries, and the depositions of the witnesses adduced for proving thereof, they find it sufficiently proven that it was the meaning of the parties to restrict the first bargain to 100 bolls; and sustain the first bargain only as to 100 bolls, the one-half of the victual of Waughton, and the other half of the victual of Auldcaibus; and, therefore, find the letters orderly proceeded for the price of 50 bolls of the said 100 bolls, at L.12 : 6 : 8d. per boll, and for the price of the other 50 bolls thereof, at L.11 : 10s. per boll; the charger always delivering to the suspender the said number of 100 bolls of bear, good and sufficient stuff, 50 bolls thereof of the growth of Waughton, and the other 50 bolls of the growth of Auldcaibus, and that of the crop and year of God 1675; and suspend the letters for the remanent sums charged for.

At the extracting of this decret for the 100 bolls, Affleck presented a second bill of suspension, on this ground, that he could not be obliged to take that bear of the crop 1675 which had been offered to him, and was lying in Cockeny, girnelled; because it was spilt [spoiled] and insufficient stuff. We offered to prove it was callor, wholesome, and sufficient, as any victual could be that had lain so long.

The Lord Glendoick, before whom this second bill fell as ordinary, issued out an

act and commission to Patrick Brown of Colstoun, Sheriff-depute of East Lothian, to pass to the places where the bear lies, and there, with the advice of skilled maltmen whom he shall call to him, visit and take inspection of it, if it be rotten or spilt, and report betwixt and the 17th of July. Accordingly, he having visited, returned his report that it was good and sufficient as any bear of the year 1675 could be. *Vide supra, James Hamilton and Earl of Roxburgh, No. 598, [July 10. 1677.]* When the Lords came to advise the report, all they had to say against it was, that the Sheriff had not visited within the days limited to him by the commission: which the Lords repelled in respect of two answers. *1mo*, That the Sheriff-depute could not possibly attend these days; because, his master and constituent, the Duke of Lauderdale, being then entering Scotland, he was waiting on him. *2do*, The defender had no prejudice, for he compeared at the visitation, though he protested against the Sheriff's procedure, in regard the days prefixed were expired, and it bore not with continuation of days. The Lords found the report proved not the reason of suspension, and therefore, *pro secundo*, found the letters orderly proceeded.

Their last refuge was to offer to prove, by John Smith's oath, *1mo*, That the victual offered was spilt with the sea water. *2do*, That it was not of the growth of Waughton. *3tio*, That it was not of the crop 1675. All which John Smith having denied; at last we got our decret extracted.

It was thought a point of favour to sustain the commission executed after the day, for Gosfuird had one casten on that single head.

On the 27th of July, at Exchequer, Auchinleck obtains the gift of his own escheat, upon the horning of one Cathcart against him for L.12 Scots; though the act of the Parliament 1592 seems to declare such gifts taken by the rebel null; yet here, creditors were not prejudged, for it accresced to them; and this was the first reason that moved the Lords of Exchequer to pass it. The second was, that the execution of the denunciation was false, as the messenger doer thereof had on his deathbed declared upon oath. But, though this might hang the messenger or make him infamous, yet it should not annul the lieges their diligences, who were not *participes fraudis*. See the case of *Ramsay*, notary, cited in the criminal pleadings for *Muire of Auchindrane*, in 1611, who was panelled for killing the *Laird of Cullayne, Tutor of Cassills*. *Vide L. 3tiam, in principio, D. ad Senat-us-consultum Silanianum*.

On the 1st of August, 1677, Sir Andrew Ramsay obtains the gift of the said Affleck's single escheat, upon his own horning against him. *Vide infra, No. 655, [January 10, Seton against Seton.] Advocates' MS. No. 623, folio 296.*

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1677. July 26. The MASTER OF RAE against The STRANAVER-MEN.

THE Master of Rae obtains a decret against the Stranaver-men for 40,000 merks, as the avail of the hareships and depredations made by them during that inroad into Caitnes in 1668. The depositions of the witnesses amounting to upwards of thirty sheets of paper, the Lords referred to two of their number to peruse; for it had been impossible at any one sederunt to have gone through them all, much less have considered what was proven by two concurring witnesses, and